SUPREME COURT U.S.
FILED
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No. _____

In THE
Supreme Court of the United States

OMAR OSAHAR,

Petitioner,

v.

JOHN POTTER, Postmaster General of The United States Postal Service,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

OMAR OSAHAR, Pro Se
10941 S.W. 143 Terrace
Richmond Heights, Florida 33176-6554
305-253-0204

Petitioner

QUESTIONS PRESENTED

(1) Whether the district court correctly granted summary judgment in favor of the Postmaster General in Appellant's employment discrimination Case.
(2). Whether there is an Adverse Action in this Case
(3). Whether the District Court **Abused it's discretion on Order to strike witnesses** (See D.E. No. 20-1) and to sanction Appellant in violation of Fed. R. Civ.P.56(c,e) and ,26,52(a) 60(b)(1) and b(6). Violations of Southern District of Florida's Local Rule 7.1.C. and 7.5.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1. U.S. District Court Judge: The Honorable Jose E. Martinez/Magistrate Judge, The Honorable Robert L. Dube .

2. Attorney for Appellant- Plaintiff in District Court : Stewart Lee Karlin, P.A..

3. Attorney for Appellee-Defendant: Marlene Rodriquez, AUSA, Marcos Daniel Jimenez, United States Attorney.

4. William Burrus, President of the American Postal Workers Union (APWU).

5. Magistrate Judge Theodore Klein

There is no parent or publicly held company Owning 10% or more of the corporations stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT	ii
I. OPINIONS AND ODERS BELOW...	1
II. JURISDICTIONAL STATEMENT	1
III. RELEVANT STATURE AND RULE	1
IV. STATEMENT OF CASE AND SUMMARY OF ARGUMENT	7
V. CONCLUSION	30

TABLE OF AUTHORITIES

Cases	Page
Adarand Constructors, Inc., Petitioner v. Federico Pena, Secretary of	22
Anderson v. Bessemer city N.C., 470 U.S. 564, 105 S. Ct. 1504, 84 L.Ed. 2d 518 (1985).	5, 15
Brown v. City of Clewiston 848 F. 2d 1534, 1540 n. 12(11th Cir. 1988).	iv
DAVIS, 245 F.3d at 1232-1246.	9a,24a,25a, 27a,30a
Gertz v. Bass, 59 Ill App2d 180; 208 N.E. 2d 113, 1965 Ill. App.	iv, 5
Graham v. State Farm Mut. Ins. 193 F. 3d 1274, 1282 (11th Cir 1999).	iv
HAIRSTON V. GAINSVILLE SUN PUB. CO. 9 F.3d 913 (11th Cir. 1993)	36a
Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 5 6,30 L. Ed. 2d 652 (1972 .	7a
Holifield v. Reno, 115 F. 3d 1555, 1562 (11th Cir 1997)	31a

TABLE OF AUTHORITIES

Cases	Page
McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800, 93 S. Ct. 1817, 1823, 36 L. Ed.2d 668 (1973).	8a
Osahar v. Carlin, 642 F. Supp. 448 (S.D. Fla. 1986) (84-1782-CIV-ARONOVITZ Southern District of Florida.)	9, 2a
Passer v. American Chem. Soc'y, 935 F.2d 322 331 (D.C.Cir.1991).	v
Pull-Standard v. Swint, 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982).	5
Transportation, et al. 515 US 200, 132 L Ed 2d 158, 115 S Ct. 2097 [No. 93-1841]	22
TRANSWORLD AIRLINES, INC. V. THURSTON, 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985).	21, 22
United States v. Gould, 301 F.2d 353,357 (5th Cir. 1962; see also Jackson v. Peoples Republic of China, 794 F. 2d 1490, 1494 (11th Cir. 1986), cert. denied, 480 U.S. 917 (1987). (See J.D. Pharmaceutical v. Save-on Drugs and Cosmetics, 893 F.2d 1201, 1207 (11th Cir. 1990)	7

TABLE OF AUTHORITIES

Cases	Page
WIDEMAN V. WAL-MART STORES, INC 141 F.3d 1453 1456 (11th Cir. 1998)	12a

STATUES AND RULES

ABA Rule 1.1 A. Competence And Rule 1.3 (B) Diligence.	4
5TH AMENDMENT - RIGHTS OF PERSONS Equal Protection, Due Process, Substantive Due Process, Discrimination	5,10,19,22
Civil Rights Act of 1964. § 701 et seq., 42 U.S.C.A. § 2000e seq.	1,6,8
Collective Bargaining Agreement	8,11,12
Employee and Labor Relations Manual (ELM)	94A
Fed R. Civ. P. Rule 7(b), Rule 12 (e), Rule 8(d)	16a
F.R.C.P. 26, 30, 33,,45,52,56 and 60	i,,2,3,5,7
Fed R. Civ. P. Rule 56(a), (c), (e) and (f).	i,4,6,8
Fed. R. of Evidence, rule 103(a)(2)	7,21

TABLE OF AUTHORITIES

	Page
Rule 7.1 Local Rules for the United States District Court for the Southern District of Florida.	i, 7
Rule 7.5, Local Rules for the United States District Court for the Southern District of Florida.	i, 3,5,6, 6a, 7a
OSHA, CFR 29, SECTION 1910 .332...334,335 etc...	vii
Section 706(e) and 703(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000 e-5(e)(2))	2,8
USPS # Q00C-4Q-C-03126482 Arbitration Ruling.	14
28 U.S.C § 1254	1
28 U.S.C § 1291	1
28 U.S.C § 1391	1
95-753-CIV-(LENARD) (Southern District of Florida.)	9, 20
98-489-CV-JAL, (D.E. No. 16 of Case 98-489-CV-489))	20 .

I OPINIONS AND ORDERS BELOW

The decision of the Court of Appeals is set out at pp. 1a-15a of the appendix, affirming the District Court Decision for Summary Judgment and is not reported which is set out on pp. 16a-38a. The District Court order granting Final Judgment is set out at pp. 101a. Plaintiff filed for rehearing but was advised by the clerk of the Appeal Court by letter dated March 2, 2005, that it was untimely because it was not filed within 45 days is set out on pp 14a-15a.

II. JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Appeal Court had jurisdiction pursuant to 28 U.S.C. § 1291.

The District Court had jurisdiction pursuant to 42 U.S.C. ¶¶ 2000e-5 and 2000-16 and 28 U.S.C. 1391

III. RELEVANT STATURE AND RULE INVOLVED

Title VII of the Civil Rights Act of 1964 42 U.S.C.A. 2000e et. seq.

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a) provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, sex, or national origin.

(1). Fed. R. Civ. P. Rule 52. (a). *Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness.*

FRCP RULE 56 (c) "The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

FRCP RULE 56 (e) ".... Sworn or certified copies of all papers or parts thereto referred to in an

affidavit shall be attached thereto or served therewith...." "the adverse party's response, by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial." The district court erred in not accepting Appellant affidavit and parts referred to in affidavit and showing of genuine issue for trial (See D.E. No.).

FRCP RULE 56(f) When Affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other as is just.

AMENDMENT 5- RIGHTS OF PERSONS, DUE PROCESS , Substantive Due Process, Discrimination and Equal Protection of the Law.

(1). Whether appellant complied with Fed. R. Civ. P. Rules 56(c), 56(e) and Local Rule 7.5, Local Rules for the United States District Court for The Southern District of Florida.

(2). Whether the District Court made clearly erroneous errors on facts in light most favorable to appellant, prejudicial errors in law and abuse of discretion on witnesses and denials in violation of F.R.C.P. Rules 26, 30, 33,45,

52 and 56.

(3). Whether Appellant attorney fail to put Appellant case in proper legal form in a timely manner and violated ABA RULE 1.1 A. COMPETENCE AND RULE 1.3 (B) DILIGENCE. The Appellant contend that had The Attorney file witness, obtained depositions and file complaint in proper legal form in a timely manner, Appellant would have won summary judgment.

(4). STANDARD OF REVIEW - CLEARLY ERRONEOUS

1. Fed. Rule. Civ. P. 56 (c). (See D.E. No. 101, page 2 and 3).

2. Fed Rule . Civ. P. 56(e). (See D.E. No. 101, page 12 and 13).

3. Fed Rule . Civ. P. 56(f). **When Affidavits are Unavailable. "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."**

5. Rule 7.5, Local Rules for the United States District Court for the Southern District of Florida. (See D.E. No. 101, page 1)

(1). Fed. R. Civ. P. Rule 52. (a). *Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness.*

(A). The Appellant asks The APPEALS COURT to view the District Court Decision in light of Rule 52(a), Fed. R. Civ. Proc. (See Anderson v. Bessemer city N.C.., 470 U.S. 564, 105 S. Ct. 1504,84 L. Ed. 2d 518(1985)). The S. Ct held there is only one standard, the **clearly erroneous** standard. Pullman-Standard v. Swint, 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed.2d 66 (1982).
(B). The Appellant asks the APPEALS COURT to view the District Court in the light of GERTZ v. BASS . When incompetent evidence which may be prejudicial is received, the verdict is set aside without proof that jury gave it any weight in reaching verdict. (See GERTZ v. BASS, 59 Ill App2d 180.)

II. PLENARY REVIEW – MISTAKES OF LAW

The Appellant ask the APPEALS COURT to view the District Court decision in light of **AMENDMENT 5- RIGHTS OF PERSONS, DUE**

PROCESS , Substantive Due Process, Discrimination.

1. Title VII of the Civil Rights Act ,42 U.S.C § 2000e-3(a)
1. Fed R.Civ.P Rule 56(e)
1. Local Rule 7.5

STATEMENT OF STANDARD OF REVIEW

(a) CLEARLY ERRONEOUS INTERPRETATION OF MATERIAL FACTS
(b) De Novo
(c) Abuse of Discretion

(c). **Abuse of discretion on Order to strike witnesses** (See D.E. No. 20-1)

IV. STATEMENT OF CASE AND SUMMARY OF ARGUMENT

District Court abused its Discretion on Order to Strike All Appellant's Witnesses with the exception of appellant. This has had a devastation impact on Appellant's case. This has impacted Appellant's evidence needed for proof of Adverse Actions and witnesses that can be used to rebuke the declarations of Appellee's witnesses. Appellee's Motion (See D.E. No. 18) was only to "LIMIT THE WITNESSES TO THOSE WITH KNOWLEDGE OF THE COMPLAINT'S ALLEGATIONS". The Court order in (D.E. No. 12, page 4) Days Before Trial, 110 days, "Parties shall exchange written

lists containing the names and address of all witnesses intended to be called at trial and only those witnesses listed shall be permitted to testify." Appellant submitted amended list about 91 days before new trail date of 10/6/03 set by the Court in (D.E. No. 15). Appellant had 11 EEO cases, covering "5 categories of witnesses" (D.E. No. 18) dividing 81 witnesses by 11 EEO cases is about 7 to 8 witnesses per EEO case. Appellant cites United States v. Gould, 301 F.2d 353,357 (5th Cir. 1962; see also Jackson v. Peoples Republic of China, 794 F. 2d 1490, 1494 (11th Cir. 1986), cert. denied, 480 U.S. 917 (1987). (See J.D. Pharmaceutical v. Save-on Drugs and Cosmetics, 893 F.2d 1201, 1207 (11th Cir. 1990) Appellee filed motion to strike on 7/3/03 (D.E. No. 17). District gave order to Strike All of Appellant witnesses but himself, on 7/7/03 (See D.E. No. 20). This is a violation of Southern District of Florida's Local Rule 7.1.C. and 60(b).

(2). Pursuant to Fed Rule. Civ. P. 60(b)(1). Appellant offers (Exhibit A-1 in Information Index) as excusable neglect that shows that Appellant car broke down on the way to lawyers office on the filing of witness list. The court has abused its discretion by striking the Appellant witnesses and thereby excluded the witnesses from deposition and testimony that are essential to the appellant's evidence of an adverse action and material facts which violates THE FEDERAL RULES OF EVIDENCE, Rule 615. Rule 615. Exclusion of witnesses

.... "This rule does not authorize exclusion of' .... "(3) a person whose presence is shown by a party to be essential to the presentation of the party's cause." The Appellant has shown through deposition, affidavit and interrogatories that certain witnesses are essential to appellant case to establish an adverse action and disparate treatment.

FRCP RULE 56 (e) ".... Sworn or certified copies of all papers or parts thereto referred to in an affidavit shall be attached thereto or served therewith...." "the adverse party's response, by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial." The district court erred in not accepting Appellant affidavit and parts referred to in affidavit and showing of genuine issue for trial (See D.E. No.).

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000 e-5(e) (2)) states "For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title(whether or not that discriminatory purpose is apparent on the face of the seniority provision).

ADVERSE ACTION

See Record excerpts Section 38.3.B, Seniority Coverage on page 199 of Exhibit A of the

AGREEMENT (UNION CONTRACT) in (D.E. No 50) it states "This Seniority Section applies to all regular work force Maintenance Craft employees when it is necessary for filling vacant assignments and for other purposes." Other purposes refers to training, leave, assignments and vacation (See Record excerpts , Lines 6-10 on page 183 in D.E. No 59).

PROMOTION

The Appeals Court state in footnote 1 on page 2 of its decision that "Osahar v. Carlin, 642 F. Supp. 448 (S.D. Fla. 1986), he was promoted to electronic technician" This is not same meaning of the promotion the Appeals Court refers to in its statement on page 4, lines 1 and 2. Where the Appeals Court States "...Osahar admitted that he was scheduled to be promoted in 2003...". The word promotion is being used out of context. The promotion referred to in lines 1 and 2 on page 4 of Appeals Court Decision is an upgrade and not a promotion in the meaning of Osahar v. Carlin, 642 F. Supp. 448 (S.D. Fla. 1986) (See exhibit 77 in record excerpts from D.E. No. 70) The promotion that the Appellant applied for and were MDAS in 1991(See exhibit 220 in D.E. No. 70) and the regional Electronic Technician promotion 1991. After Applying for those positions the Appellant found discovered later in 95-CV-753 (See Statement by D. Wilkie in 95-CV-753) that the court was being told that operations management level employee where selected for MDAS position while in Miami non-operations management level employee where

selected. The Appellant was denied MDAS promotion in 1991 for Discriminatory Motive.

AWOL

(a). Appellant cites Pre-Arbitration settlement Appeal # U96-0485 between the American Postal Workers' Union and United States Postal Service that states "The AWOL (8/9/96) in the above cited Grievance is Hereby converted to LWOP and will not be cited in any Subsequent Action."(Appellant is supplying a copy pursuant to THE FEDERAL RULES OF EVIDENCE , Rule 1006 cited below, Exhibit 222, which is listed the records excerpts as trial exhibit 222, and was part of "The contents of voluminous writings") As proof that the Appellant lost wages for 8/9/96 and interest. The grievance was not signed by the Appellant and denied the Appellant Due process and equal protection of the Fifth (5) of the Constitution of the United States. The Appellant was not allowed an Arbitration hearing. Only the grievant can request LWOP in lieu of sick leave according to Union Contract and U.S. Postal Service Policy. Appellant lost 8 hours of paid on 8/9/96 (See record excerpt D.E. No 50, exhibit U). Appellant was not paid for 8/9/96 see record excerpt D.E. No. 50, exhibit V and X, which only show being paid for 40 hours of the 48 hours of AWOL from 8/10-16/96) The Appellant was not paid for 8/9/96 (See Record excerpts, lines 6-11 on page 122 of D.E. No. 59)(See Right side

Of Record excerpts(D.E. No. 50, Exhibit U) under Pay period(PP) 17/year 96)and D.E. No 70, Exhibit 139).

Which shows 8 hours of WOP from Fri 07 to Fri 14 for 6 days 6 x 8 = 48).(See pages 121-123 and 129-130 from D.E. No 59) The Appellee cited the wrong dates for investigation for 8/9-16/96 for AWOL. Appellee cited August 27- Sep 7/96 (see Exhibit P from D.E. No. 56). AWOLs were because of a Discriminatory Motive.

(d). Letter dated 7/25/97, which is exhibit 63 in D.E. No 59 and See pages 215-217 in D.E. No.59), States "L.O.W (Letter of Warning) June 11,1996 will be removed from all records...." This letter does not mention May 11,1996 AWOL that was later changed to LWOP (leave without pay) against Appellant request. LWOP by Leave Policy, can only be requested by the employee. Appellant requested sick leave . Appellant mention comparisons, Thomas Gaunt and Bob Aquilino which were not treated this way when they went home sick or call-in sick (See D.E. No. 40) and (pages 1-17 in D.E. No. 70).

TRAINING

TRAINING WAS NOT POSTED SOLICITING VOLUNTEERS

Article 38.6.A.6 of the COLLECTIVE BARGAINING AGREEMENT states "As soon as

approved training allocations are received at the installation, advance written notices will be published soliciting volunteers. A list of those volunteers shall be posted and a copy furnished to the local Union."

Formal training for EZR II, MODSS (New computer installation training for Mod Scales), training on July 1, 1997(See exhibit 203, in D.E. No. 70), Barney training for the 010 system and other training that was not posted. (See record excerpts, item 3 on page 1 in D.E. No. 70) and page 66 from D.E. No. 59). Page 237 in D.E. No. 59) 1.Appellant mentioned comparisons Phil Demars and Villar mention on pages 102 in (D.E. No 59).

VACATION

(c). When Appellant submitted Form 1547 for vacation , 1547 forms are required to be approved by supervisor before January 1 by U.S. Postal policy. Item 5 states "The choice vacation periods for crafts represented by the APWU shall begin January 1 and will end November 30 of each year." (See Record excerpts ,Exhibit 143 in D.E. No 70). Employee are allowed **two (2) periods for a total of 15 days as their first choice for vacation (See records excerpts D.E.No. 70, exhibits 143, 145 and146).** Appellant requested 8/10/97-8/23/97 and 1/23/97-1/29/97 as Appellant's first choice of (2) periods for a total of 15 days (See Record excerpts D.E. No.

50 exhibit M). Appellant was denied one of two Periods the vacation Period (1/23/97-1/29/97) that Appellant should have been given. (See Records excerpts D.E.50, exhibit N and pages 170, 172 and 130 in D.E.No. 59). **Leave in this period was instead given to Steve Copestick, white Junior employee(See seniority List, exhibit 147 from D.E. No 147)).** On lines 15-19 in D.E. No.59 a question was asked "Mr. Osahar, here is Exhibit 40 which on the top contains a PS Form 3971 for vacation that was approved for 2/14 on 2/6/97 and the bottom contains the same PS 3971 form that's Exhibit 38." The word vacation was mention in error for the top form but the States Attorney LAGOA corrected her self with the bottom form when she said "the same PS 3971" which was not for vacation (See Record excerpts, exhibits P and R from D.E. No 50) which are Government's Exhibit 40 and 38 in D.E. No. 70 which is annual leave for a Meeting with the Department of Labor case # 06-0640935,concerning on-the-Job stress and sick leave for stress. Appellant did not have a vacation period for 2/14/97. 2/14/97 was a 3971 Annual leave for a meeting. When the U.S. Attorney LAGOA asked "Q. Mr. Osahar, did you have other vacation approved in 1997." "Q. Well, we know you had February 14, 1997 approved." (See Record Excerpts lines 9-25, on page 174 in D.E. No 59). This was an error. Appellant lost one choice vacation period as cited in the records that was never recovered

(1/23-29/97). Vacation is different from regular Annual leave request and requires two forms (1) Form 1547 must be submitted before vacation and a 3971 must be submitted before taking leave. For regular leave only a form 3971 is required. Appellant was denied Vacation for one of two period on vacation form 1547. Instead it was given to junior white Electronic Technician Steve Copestick, which Appellant mention in the record as a comparison (See record excerpts , pages 170-172 in D.E. No. 59)

OVERTIME

See pages 198-199 in D.E. No 59 Lines 12-21 higher level and overtime pay lost and benefits of seniority lost and pages 109 in D.E.No.59).

SUBSTANTIAL

Arbitrator Das has ruled in USPS # Q00C-4Q-C-03126482 have violated employees rights in regards to Article 10 of the Union Contract and ELM Sub chapter 510 depriving the Appellant of Equal protection and Due Process of Law when the U.S.P.S. deprives the Appellant of wages by AWOL and Training by not posting of the training as stated by Union Contract. Lost of vacation period 1/23-29/ The Appellant was Not allowed to call my family about bad water Alert in my area (See 206 in D.E.No 59. While other employees were allowed to use the pay phones for emergency calls.

Anderson standard Clearly erroneous standard should be applied because of discriminatory motive. These are prejudicial errors that have severely prejudiced the appellant evidence of adverse actions and material facts.

COMPARISONS

Comparison Thomas Gaunt never denied not going home sick after being given an assignment he did not like and not being AWOL or asked to bring in medical documentation for less than 3 days (See D.E. No. 40). Comparisons mention in affidavit of Plaintiff on (pages 1-17 in D.E. No. 70).

1. Comparisons mention Tom Gaunt who when home sick after refusing an assignment he did not like and was not AWOL (See D.E. No 59, page 196, Line 12)

2. Denied Appellant motion to amend complaint and to continue trial (D.E.No. 26) Pursuant to Rule 15(d). The Appellant stated "Further if deposition need to be taken after the discovery, the court can allow the deposition to be taken" (See Plaintiff's Reply (D.E. No. 27) which would have given evidence of material fact related to overtime and adverse action.

Appellant was not promoted appellant was upgraded by unicn contract (See page 2)(See lines 13-23 on page 14 and lines 1-25 on page 21 of D.E. No 59).

Travel Pay

Omar Travel to Oklahoma

Airfare when driving Paid to employee	361
Shuttle	24
4 periods x rate 7.50	30
(5 days at 7.00 Each Pre Diem)	35
Paid to employee	450

Edward J. Harbison Travel to Oklahoma

Airfare when flying paid to airline	361
Shuttle	24
5 periods x rate 7.50	37.50
(5 days at 7.00 Each Pre Diem)	35
	457.50

457- 361 = 96

Had to Fly instead of driving when told at the last minute about the Tacs Cutover installation Travel to show the TACS Trained Electronic Technician how to convert from PSDS to TACS in Atlanta and that would later be used in Miami. And was related to Formal Tacs Training in Oklahoma. Mike Dennis was not Formally trained on Tacs in

Oklahoma at the time of our Atlanta Travel (See 2 sheets for exhibit 213 from D.E.No 70). 450 + 362 (which was returned to the U.S.P.S. by money order see exhibit 219 from D.E. No 70) = 762 for travel to Oklahoma (361 was returned to U.S. Postal Service within time period) 762-361 = 451.

If the Appellee is claiming that it gave the Appellant, Omar Osahar 361 for the Atlanta trip it can't claim there was another 361 for the Oklahoma trip. Given the Appellant 361 + 445.70 = 806.7 for the Appellant which is less that then the 699 + 207.20(Real Airline fare not listed on travel voucher and unknown) = 906.20 for the white Electronic Technician, Mike Dennis (See D.E. No. 46, J and K)

<u>Omar Travel to Atlanta</u>

Was not given 361 for
Atlanta Trip, was given
361 for Oklahoma trip
That was returned.

Airfare when driving Paid to employee	207.50	
Shuttle		0
Hotel Room at $ 102.30/DAYS	4	409.20
pre deim 5 days at 38.00/DAY		190

Paid to Omar Osahar (See D.E. No 46, Exhibit J)	445.70

Mike Dennis Travel to Atlanta

Airfare when flying (not listed)	207.50
paid to airline	0
Shuttle	100
Hotel Room at $ 102.30/DAYS 4	409.20
pre deim 5 days at 38.00/DAY	190
If paid airfare	906

906-207.50 = 699.2

(See D.E. No. 46, Exhibit K)

If 361 from Oklahoma trip added to Atlanta trip 445.70 + 361 = 806.7 which is less than $906 .

Assuming that the policy allowed the predeim of both trips to be added Appellant Omar would have had 445.70 + 361 =806.7 in comparison The white Junior Electronic Technician(See seniority list exhibit 147, From D.E. No. 70), Mike Dennis that was not qualified on the TACS system as required was given 699.2 +

over 207.50(which was paid to airlines and not listed on his travel voucher) = 906 or more. The Policy of the U.S. Postal Service states "When employees owe money to the Postal Service they receive a letter of demand for the amount due. They also receive notification of their rights and responsibilities under the Debt Collection Act and notification that the postal Service may take action to involuntarily collect the amount due. Employees may make full payment on their receivable or they may submit PS Form 3239 to repay in installments from their future paychecks. Employees with open accounts receivable also receive monthly statements from Minneapolis until the debt is repaid entirely."(See records excerpts, Exhibit 75 from D.E. No. 70). Deprive the employee of travel pay when each travel trip is treated separately **Deprives the Appellant Due Process and Equal Protection of the law of the 5th Amendment of the Constitution.**

1-H-331-0033-98

1. Appellant did not file complaint for 1-H-331-0033-98 because the Appellant was under court order not file complaint (See record excerpts)

Appellant stated in Deposition "I was issued an order by - - I was adding And amending the first case and I was told by the Judge at that particular

time, I think Judge Joan A. Lenard, not to file anymore particular cases, which might have affected my filing of 1-H-331-0033-98." Q. "Mr.Osahar, did you file a lawsuit in August 2001 on 1-H-331-0033-98."

A. "If I didn't it was because of an order by Joan A. Lenard that was given to me at that particular time." (See records excerpts and See lines 9-19, on page 98 and pages 89-90 from Deposition of Omar Osahar, D.E. No. 59).

Appellant was under order, on March 27,1998, from District Court Judge Joan A. Lenard, which stated "The Plaintiff is to refrain from filing any further such actions until the disposition of Case No. 95-753-Civ-Lenard or until the court provides him with leave to do so." (See order Consolidating Cases 95-753-CV-JAL and 98-489-CV-JAL, (D.E. No. 16 of Case 98-489-CV-489)) . Case 98-489-CIV-LENARD was consolidated with Case 95-753-CV-JAL, and 95-753-CV-JAL ended around September 17, 2001 (See D.E.No. 166, in Case 95-753-CIV-TURNOFF) in favor of Appellant, The Jury found hostile work environment and disparate treatment. In August 2001 Case No 95-753-CIV was in disposition and Appellant could not file EEO 1-H-331-0033-98 by order of the Court. After Case 95-753-CIV had ended Appellant file complaint listing EEO case No. 1-H-331-0033-98.

LAW

THE FEDERAL RULES OF EVIDENCE , Rule 1006. Summaries "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court." The Appellant supplied the Appellee with "The contents of voluminous writings" some of which were copied and another that the Appellant is supplying to the Appellee court in summary of lost of wages (See exhibit)

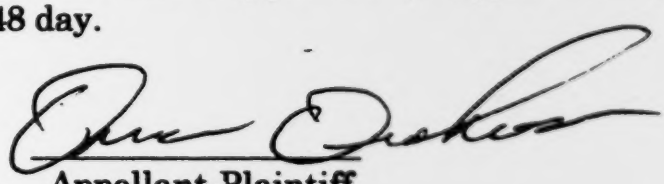
Erroneous error and abuse of discretion

Violation of THE FEDERAL RULES OF EVIDENCE , of Rule 104. "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a findings of the fulfillment of the condition." The Court has Held That : " Compensation , terms, conditions or privileges of employment", includes not just the wage rate of the employees, but all forms of job benefits, including severance pay, pensions, **vacations, availability of overtime, eligibility for training, and desirability of job assignments** (See TRANSWORLD AIRLINES, INC. V. THURSTON, 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985)).

Violation of 5th Amendment of the constitution (See . Adarand Constructors, Inc., Petitioner v. Federico Pena, Secretary of Transportation, et al. 515 US 200, 132 L Ed 2d 158,
115 S Ct. 2097 [No. 93-1841])

CONCLUSION

Based upon the foregoing argument and citations of authority, and application of the law may not be arbitrary, capricious, or unreasonable the Court should grant certiorari this case and vacate the Appeal Court's December 29,2004 decision, and remand this case for further proceedings in accord with TRANSWORLD AIRLINES, INC. V. THURSTON, 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985). Plaintiff believed at the time that the 3 day rule added 3 days to the 45 days for rehearing. Plaintiff filed rehearing petition (see pp. 14a-15a) on the 48 day.



Appellant-Plaintiff
Omar Osahar, Pro Se
10941 S.W. 143 Terrace
Richmond Heights, Florida 33176-6554
305-253-0204
April 6, 2005

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 04-1158 & 04-11603
Non-Argument Calendar

D.C. Docket No. 02-22227-CV-JEM

OMAR R. OSAHAR,

Plaintiff-Appellant,

versus

UNITED STATES POSTAL SERVICE,
John Potter Post Master General,

Defendant-Appellee.

Appeals from the United States District Court for the Southern District of Florida

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(DECEMBER 29,2004)

Before ANDERSON, HULL and KRAVITCH, Circuit Judges.

PER CURIAM:

Omar Osahar, represented by counsel, filed an employment discrimination Complaint against the U.S. Postal Service ("the Service"), alleging that he was Subjected to racial discrimination, retaliation for filing grievances, and a hostile work environment[1]. The complaint lists the following alleged discriminatory and Retaliatory acts: (1) Osahar was listed as absent without leave ("AWOL") when he Left work because he was forced to work on machinery without training, which he Considered to be unsafe, that he received a "discussion" about his attendance, and That he later received a letter of warning; (2) he was given assignments without Training; (3) he was subject to verbal harassment; (4) his supervisor falsified his Leave request; (5) his supervisor disapproved annual leave; (6) his pay was shorted; (7) he was not paid for travel; (8) he was harassed by his supervisor while he was at home on sick leave; (9)

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[1] Osahar had been working for the Service since 1974, and had sued the Service in 1986 alleging discrimination in promotions. After he won this suit, see Osahar v. Carlin, 642 F. Supp. 448 (S.D. Fla. 1986), he was promoted to electronic technician. As required by the terms of the collective bargaining agreement, he was promoted again to electronic technician grade 10. He admitted that he was scheduled to be promoted to grade 11 2003 under the terms of the agreement. According to Osahar, he had been subjected to on-going discrimination and hostility throughout his tenure with the Service.

he was required to supply medical documentation for his sick leave; (10) he was discriminated against in training and assignments; (11) less senior employees were given preferential assignments; (12) he was treated differently than other employees; and (13) his time card was missing from the rack. In connection with each of these allegations, Osahar had Filed an EEO Grievance[2], Osahar further alleged that someone had placed nooses and a confederate flag at the job site, and that he was called a liar when he asserted that he was being discriminated against. Finding the complaint difficult to follow, the court ordered Osahar to file supplemental briefing explaining his allegations. The court also granted the Service's motion to strike Osahar's witness list, which contained more than eighty witness. In response to the court's order, Osahar explained his EEO grievance. The Service moved for summary judgment, arguing, inter alia, that Osahar could not show any discrimination or retaliation because he could not establish an adverse employment action or a similarly situated employee who was treated more favorably. The Service asserted, however, that even if Osahar could establish a prima facie case, he could not show that its legitimate nondiscriminatory reasons were pretextual. Finally, with respect to the hostile work environment claim, the service argued that the

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[2] There were eleven grievances filed; Osahar often raised more than one claim in each grievance, and in some cases, made similar complaints in separate grievances.

conduct was not subjectively and objectively offensive. In support of the summary judgment motion, the Service submitted numerous declarations from other employees. In his deposition, Osahar admitted that he was scheduled to be promoted in 2003, that the promotion would bring a salary increase, and that he had received several awards and certificates in appreciation of his service. Addressing his allegations, Osahar stated that he had not been terminated or laid off, had not lost seniority or benefits, and had not been disciplined. Although he acknowledged that the employee manual stated that training did not guarantee a promotion, he claimed that the refusal to send him to training could impact future promotions, overtime, and assignments. Osahar admitted that employees could not choose their Assignments, but he explained that he believed junior employees were given more favorable assignments. Osahar further admitted that he had been sent on training trips in 1996 and 1998 that covered the same training as the trip he was not selected to take, and he could not say how many trips other employees were permitted to take. He claimed, however, that he still was affected by the denial of this training. Osahar acknowledged that an employee could receive on-the-job training, but he asserted that he felt unsafe on a specific machine despite being ordered to work on it. He stated that this made him feel humiliated and, therefore, he went home sick. Osahar denied that he had been given training on the machine and stated that the updated machine was completely

different. Addressing his allegations about his sick leave, AWOL status, and medical documentation, Osahar could not say whether other employees had called in sick prior to their scheduled annual leave or if other employees had been called at home or were requested to bring in medical documentation. Osahar acknowledged that the regulations permitted a supervisor to request documentation even if the leave did not exceed three days if the supervisor felt it was in the Service's interest, and he admitted that, after he supplied documentation, his AWOL status was removed and he was paid for sick leave. Osahar further alleged that his time Card was missing from the rack, but he could not say whether any other cards were missing. Regarding his annual leave, Osahar explained that leave was determined by seniority, and he admitted that his leave had been approved at other times before and after he filed his complaint. Finally, Osahar explained that he had been subject to verbal attacks, and that, although he could not remember the exact words, the attacks did not involve racial epithets. He accused a coworker of saying, "what's that smell," which he claimed was a racial slur.

Osahar responded to the summary judgment motion, asserting that he
Established a prima facie case with direct evidence of discrimination based on the "smells" comment. He further alleged that he was subject to a continuing pattern of discrimination and a hostile work environment because other employees wrote derogatory remarks on a trash can and in the

bathroom, employees placed garbage cans and recycle bins in his workspace and in front of his locker, and placed cleaning equipment in front of his tool box. In support of his argument, he submitted his own affidavit.

The district court granted the motion for summary judgment[3], rejecting Osahar's assertion that he had direct evidence, and concluding that Osahar could not establish a prima facie case of discrimination or retaliation[4] because there was no adverse employment action and because Osahar failed to demonstrate similarly situated employees who were treated more favorably. Moreover, the court determined that, even if Osahar established a prima facie case, the Service offered legitimate nondiscriminatory reasons for its conduct, which Osahar could not show were pretextual. Finally, the court found that Osahar could not establish a hostile work environment because there was no evidence that the acts complained of were based on race or EEO activity, and the incidents were, at most, isolated. Osahar now appeals.[5]

II. Discussion[6]

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[3] The court noted that Osahar had failed to comply with Local Rule 7.5, which required Osahar to submit a single statement of material facts in dispute. The court explained that Osahar had failed to make any specific references to the record evidence, and , therefore, it deemed the Service's statement of facts admitted.

[4] The court assumed that Osahar could establish a causal connection between the acts and his protected activity.

[5] On appeal, Osahar is proceeding pro se.

We review a district court's grant of summary judgment de novo, viewing The evidence in the light most favorable to the party opposing the motion. Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1085(11th Cir.2004). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56(c); Eberhardt v. Waters, 901 F.2d 1578, 1580 (11th Cir. 1990). A party opposing a properly submitted motion for summary Judgment may not rest upon mere allegations or denials of his pleadings, but must Set forth specific facts showing that there is a genuine issue for trail. Fed.R.Civ.P. 56(e); Eberhardt, 901 F.2d at 1580. Once the party

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[6] As an initial matter, although the Service argues that Osahar waived his issues by not specifically identifying the issues on appeal, Osahar, as a pro se appellant, is entitled to liberal construction of his appellate brief. See Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 596,30 L. Ed. 2d 652 (1972). However, we need not consider whether Osahar's attorney committed malpractice and whether the court failed to allow sufficient discovery. Osahar did not raise these issues before the district court, and he cannot raise them for the first time on appeal. Narey v. Dean, 32 F. 3d 1521, 1526-27 (11th Cir. 1994); see also Access Now, Inc. v. Southwest Airlines Co. (No. 02-161163) (11th Cir. Sept. 24, 2004) (explaining the Narey exceptions). In addition, Osahar offers no argument explaining how the court erred in finding one of his grievances time barred. Accordingly, he has abandoned this claim. Rowe v. Schreiber , 139 F.3d 1381, 1382 n.1 (11th Cir 1998)

seeking summary judgment meets its burden of showing the absence of a genuine issue of material fact, the burden shifts to the non-moving party to submit sufficient evidence to rebut the showing with affidavits or other relevant and admissible evidence. Avirgan v. Hull, 932 F.2d 1572, 1577(11th Cir. 1991).

A. Discrimination

Title VII prohibits discrimination of the basis of race. 42 U.S.C. § 2000e;
McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800, 93 S. Ct. 1817, 1823, 36 L. Ed.2d 668 (1973). To establish a prima facie case of discrimination on the basis of disparate treatment, the complainant must show "(I) that he belongs to a facial minority;(ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [his] qualifications, he was rejected; and (iv) that, after [his] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." McDonnell Douglas Corp. 411 U.S. at 802; Kelliher v. Veneman, 313 F.3d 1270, 1275 (11th Cir. 2002). Once the plaintiff establishes the prima facie case, the burden shifts to the employer to show a legitimate, non-discriminatory reason for the employer's actions. The plaintiff then must show that the employer's reason was a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-04, 807. The court should evaluate whether the plaintiff demonstrated "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered

legitimate reasons for its actions that a reasonable fact finder could find them unworthy of credence." Combs v. Plantation Patterns, 106 F.3d 1519, 1528 (11th Cir. 1997). A subjective reason for the employer's action can be
As legitimate as any other reason, and an employee cannot substitute his business judgment for that of his employer. Chapman v. AI Transport, 229 F.3d 1012, 1030, 1033(11th Cir. 2000)(en banc).

The district court properly concluded that Osahar failed to establish that he Was subjected to an adverse employment action. An adverse employment action is defined as "a serious and material change in the terms, conditions, or privileges of employment," and must have a tangible adverse effect on the employee's employment.[7] Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1239(11th Cir. 2001); see also Shannon v. BellSouth Telecom. Inc., 292 F.3d 712, 716(11th Cir. 2002). "Moreover, the employee's subjective view of the significance and Adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances." Id.

Here, none of the conduct complained of rose to the level of a serious and material change in the

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[7] The mere change in job title without loss of salary, benefits, or opportunities for advancement is not an adverse employment action, and courts "have been reluctant to hold that changes in job duties amount to adverse employment action when unaccompanied by any tangible harm" Davis, 245 F.3d at 1244.

terms or conditions of employment. Osahar admitted that he had not been termininated or disciplined, nor had he lost seniority, and there is no evidence in the record to support his claim of lost wages. Osahar admitted that technicians were not permitted to choose their assignments, and that training would not guarantee a promotion. Additionally, the declarations from other technicians Established that they often were required to do less desirable work regardless of their seniority. Essentially, Osahar was unhappy with his assignments and his work Environment but "not everything that makes an employee unhappy is an Actionable adverse action." Doe v. Dekalb County School District, 145 F.3d 1441,1449 (11th Cir. 1998). Thus, Osahar failed to demonstrate that he suffered an adverse employment action.

Moreover, Osahar did not establish discrimination based on similarly Situated employees who were treated more favorably. In determining whether [others] are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways....The most important factors in the disciplinary context....are the nature of the offenses committed and the nature of the punishment imposed. Maynard v. Board of Regents of Div. of Universities of Florida Dept. of Educ. Ex Rel. University of South Florida, 342 F. 3d 1281, 1289 (11th Cir. 2003)(citing Jones v. Bessemer Carraway Med.

Ctr., 137 F.3d 1306, 1311 (11th Cir.), opinion modified by , 151 F.3d 1321 (1998) and Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1259 (11th Cir.2001).

Here, Osahar failed to show another employer who left work sick after Receiving an undesirable assignment who was not asked to provide medical Documentation. In addition, several technicians stated that they had been required to provide medical documentation after calling in sick, and had been called at home for such information. Therefore, Osahar failed to establish a comparator, and summary judgment was proper.[8]

B. Retaliation

Title VII further prohibits retaliation in the employment arena for engaging in protected activities. 42 U.S.C. § 2000e-3(a). The analysis of a retaliation claim based on circumstantial evidence follows the same three-step approach utilized in a disparate treatment claim. Bass v. Bd. Of County

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[8] Osahar misunderstands the comparator requirement, and the court did not compare the wrong employees for purposes of travel reimbursement. To show that a similarly situated employee was treated more favorably for discrimination claims, Osahar must show how an employee engaged in similar misconduct was disciplined differently. The travel reimbursement claim is not a discipline, and therefore, would not be the issue for a comparator. Moreover, the evidence established that Osahar received a different amount than a coworker because he chose to drive rather than fly and because he had money left over from a previous advance that was applied to the trip.

Comm'rs of Orange County, Fla., 256 F.3d 1095, 1103 (11th cir. 2001). A plaintiff's prima facie case of retaliation must allege that "(1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) there was a causal link between his protected activity and the adverse employment action." [9]Chapman, 229 F.3d at 1117.

Even assuming, as the district court did, that Osahar could establish a causal link, as discussed above, Osahar failed to show that he was subjected to an adverse employment action.

C. Hostile Work Environment

In order to establish a hostile work environment claim, a plaintiff must show that (1) he belongs to a protected group, (2) he has been subject to unwelcome harassment, (3) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatory abusive working environment, and (5) the employer was responsible for such environment under either a theory of vicarious or direct liability. Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

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[9] To establish the causal-connection element, a plaintiff need only show "that the protected activity and the adverse action are not completely unrelated." Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1457 (11th Cir. 1998) (quotation omitted); see also Gupta v. Florida Bd. Regents 212 F.3d 571, 590 (11th Cir. 2000).

The severity element contains both an objective and a subjective element, and, therefore, this behavior must result in both an environment "that a reasonable person would find hostile or abusive," and an environment that the victim "subjectively perceive[s]...to be abusive." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22, 114 S.Ct. 367, 370-71,126 L.Ed 295 (1993); Miller , 277 F.3d at 1276. In evaluation the objective severity of the harassment, we look at the totality of the circumstances and consider, inter alia, (1) the frequency of the conduct, (2) the severity of the conduct, (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance, and (4) whether the conduct unreasonably interferes with the employee's job performance. Miller, 277 F.3d at 1276. "[I]t is 'repeated incidents of verbal harassment that continue despite the employee's objections that are indicative of a hostile work environment' and not simply some 'magic number' of racial or ethnic insults." Id. (citation omitted). Nevertheless, harassment need not be shown to be so extreme that it produces tangible effects on job performance in order to be actionable. Harris, 510 U.S. at 22.

Here, Osahar alleged that occasional incidents occurred such as a noose
Hung, a trash can or tools placed in front of his work space and locker, and Someone asked"what smells." The district court found that these were isolated incidents, and Osahar admitted in his deposition that he was not subject to racial epithets. As Osahar cannot show that the

harassment was based on his protected status, his claim for hostile work environment fails. Moreover, there was no evidence that the alleged harassment altered the terms or conditions of his employment, or that the harassment rose to an actionable level of severity. Rather, the evidence establishes that, although the conduct was offensive, it was not sufficiently severe or pervasive as to avoid a motion for summary judgment.

III. Conclusion

For the foregoing reasons, we AFFIRM the district court.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk
www.call.uscourts.gov

For rules and forms visit

March 02, 2005

Omar R. Osahar
10941 SW 143RD TER
MIAMI FL 33176-6554

Appeal Number: 04-11158-AA
Case Style: Omar R. Osahar v. U.S. Postal Service
District Court Number: 02-22227 CV-JEM

The following action has been taken in the reference case:

Please be advised that this ofc is in receipt of your petition for rehearing. It was received 2/17/05; however, it was due to be received within 45 days of 12/29/04(2/14/05). If you would like to have it returned, please supply us with FEDEX number.

Sincerely,

THOMAS K.KAHN, Clerk
Reply To: Shirley M. Brown (404) 335-6170

MOT-2(03-2004)

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO. 02-22227-CIV-MARTINEZ

OMAR R. OSAHAR,

Plaintiff,

vs.

JOHN POTTER, Postmaster
General of the United States Postal Agency,

Defendant.
_____/

ORDER GRANTING FINAL SUMMARY JUDGMENT

THIS CAUSE came before the Court upon Defendant's Motion for Final Summary Judgment (D.E. No. 29-1), filed on August 12, 2003. For the reasons set forth below, Defendant's Motion for Summary Judgment is Granted.

I. Procedural History and Background

Defendant filed its Motion for Summary Judgment (D.E. No.29-1), which has fully Briefed

and is ripe for adjudication. The Court having carefully considered the case file,[10] having ordered and received supplemental briefing,[11] and otherwise being duly advised, finds summary judgment is appropriate in this case.

Plaintiff, Omar Osahar ("Osahar"), is an employee of the United States Postal Service

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[10] The Court notes Plaintiff failed to comply with Rule 7.5, Local Rules for the United States District Court for the Southern District of Florida, which required Plaintiff to file a "single concise statement of material facts to which it is contended that there exists a genuine issue to be tried" The Rule further provides:

> All material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the opposing party's statement, if and only to the extent supported by specific references to the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court.

Plaintiff's statement does not contain any specific reference to the extensive record. Accordingly, Defendant's statement of facts is deemed admitted.

[11] Since Osahar's Complaint is based upon twelve separate Equal Employment Opportunity ("EEO") complaints and Osahar's Response to the motion was incoherent and insufficient, the Court ordered supplemental briefing to provide Osahar an additional opportunity to clarify his arguments. A review of Osahar's Sur-Response reveals it appears to have been prepared by Osahar rather than counsel. The Sur-Response fails to provide meaningful "pinpoint citations to the record" as ordered to assist the Court in framing the issues and formulating its decision.

("USPS") and has been a full-time employee of the USPS since June 24, 1974 (Joint Pretrial Stipulation ("JPTS") at ¶ V(C)). Osahar, when he brought suit, was a Level 10, Electronic Technician, working as a maintenance craft employee at the Miami Postal and Data Center. *Id.* at ¶ V(E). Osahar was scheduled to be promoted to a Level 11 in November 2003. *Id.* at ¶ V(G). Osahar received a salary increase with each promotion. *Id.* at ¶ V(H). Osahar filed this suit against John Potter, the Postmaster General of the USPS, as the statutory defendant [hereinafter, Defendant, John Potter, as well as the United States Postal Service will be collectively referred to as "USPS"]. Osahar claims disparate treatment based on race (black; African-American) (Compl. ¶¶1, 4) and protected activity; retaliation; and hostile work environment (Compl.,) Docket Entry Number ("D.E. No.") 1) in violation of Title VII.

II. Legal Standard

Under Fed.R.Civ. P.56(c), a Motion for Summary Judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Supreme Court further explained the movant's burden in Celotex Corp. v. Catrett, 477 U.S. 317 (1986) as follows;

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element to that party's case, and on which that party will bear the burden of proof at trail.

Id. at 322. The Court further stated that "Rule 56(c) therefore requires a non-moving party to go beyond the pleadings and by [its] own affidavits or by the deposition, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324.

By its very terms, this standard provides that the mere existence of "some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there will be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original); see also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Additionally, while allegations will withstand a motion to dismiss under Fed.R.Civ.P. 12(b)(6), "[i]n response to a summary judgment motion.....the plaintiff can no longer rest on... 'mere allegations,'[which are acceptable at the pleading stage] but must 'set forth' by affidavit or other evidence 'specific facts'" *lujan v. Defenders of wildlife*, 504 U.S. 555, 561 (1992). While considering a Motion for Summary Judgment, the Court is required to review the entire case file,

along with any affidavits, depositions, and other supporting evidence provided. Fed. R.Civ.P. 56(c).

III. Analysis

A.EEO Complaint 1-H-331-0033-98 is Time Barred

EEO Complaint 1-H-331-0033-98 is time barred. Title VII requires that if an employee receives a final agency decision ("FAD") on an administrative complaint, he filed his case in the appropriate district court within ninety days of his receipt of the decision. 42 U.S.C. §2000E-16(c).

In March 1998, the USPS's FAD for complaint no. 1-H-331-0033-98 was mailed to Osahar. (Def.s Stmt. ¶ 153). On March 10, 1999, the Equal Employment Opportunity Commission ("EEOC") affirmed the USPS's FAD dismissing the case. Id. at ¶ 154. On April 8, 1999, Osahar filed a Motion for Reconsideration. *Id.* at ¶ 155. On June 13,2001, the EEOC denied Osahar's request for reconsideration. *Id. at* ¶ 156. Osahar commenced this suit on July 26, 2002. (D.E.No. 1).

Osahar's "continuing violation: claim does not relieve him from the ninety-day requirement. See Scott v. Sr. Paul Postal Serv., 720 F. 2d 524, 525 (8th Cir. 1983). Since Osahar failed to file his a complaint regarding 1-H-331-0033-98 within the requisite ninety-day time period, his claims relating to that complaint are time-barred.

B. Disparate Treatment

Discrimination may be established through two theories of liability; "disparate treatment," in which a person is intentionally treated adversely because she belongs to a protected class, or "disparate impact,: in which a person is impacted by a facially-neutral rule.[12] *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988). In order to prove a *prima facie* case of "disparate treatment" discrimination, Plaintiff may prove his case through: 1) circumstantial evidence of discrimination; 2) pattern and practice evidence of discrimination; or 3) direct evidence of discrimination. *See Zappa v. Wal-Mart Stores, Inc.*, 1 F. Supp. 2d 1354, 1356 (M.D. Fla. 1998)(setting forth three methods of proving disparate treatment discrimination due to age). Osahar claims to meet his burden through direct evidence and indirect evidence. The Court shall address each contention in turn.

1. Direct Evidence

Direct evidence of discriminatory intent is shown by statements or actions directly evincing discriminatory animus that are made by the decision maker in connection with the decisional process at issue. *See, e,g. Buckley v, Hosp. Corp. of Am.*, 758 F.2d 1525 (11th Cir. 1985)(direct evidence of age discrimination found where employee was

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[12] Osahar admits he does not allege disparate impact discrimination (See Compl,; JPTS).

told by supervisors that she would be demoted because she had lost her temper "due to her advance age"); EEOC v. Alton Packaging Corp., 901 F.2d 920, 924 (11th Cir. 1990); Zappa, 1 F. Supp. 2d at 1356 ("not every stray remark regarding a person's [protected class] provides direct evidence of bias"); see also Wilde v. Fla Pneumatic Mfg. Corp, 941 F. Supp. 1203 (S.D. Fla. 1996).

Osahar claims he has direct evidence of discrimination based upon comments that he "smells" and is a "liar" and based on "other conduct" (Compl. ¶ 10(r); Resp. at 10). Osahar does not identify the "other conduct." Nor does Osahar identify the speaker of the alleged comment that Osahar smells. *Id.* USPS clarifies Osahar's deposition identifies the speaker as Mike Dennis, who is not Osahar's supervisor(see Def.'s Reply at 5, n.7). Direct evidence consists of *statements or actions* directly evincing discriminatory animus that are made *by the decision maker* in connection with the decisional process at issue. See, e.g., Buckley, 758 F.2d 1525. Assuming the comments that Osahar smells and is a liar were uttered, neither is regarding a protected category. As Osahar failed to establish a prima facie case of discrimination based upon direct evidence, the Court will assess whether Plaintiff has carried his burden through indirect evidence.

2. Circumstantial Evidence

Since direct evidence is rarely available, discrimination may be proved by circumstantial or

"indirect" evidence. A plaintiff may establish a prima facie case of discrimination based on disparate treatment using indirect evidence. Once Plaintiff has established a prima facie case, the burden shifts to the employer to proffer a legitimate, nondiscriminatory reason for the discharge. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Finally, the burden shifts back to Plaintiff to prove by a preponderance of the evidence that the "legitimate" reason is merely pretext for the prohibited, retaliatory conduct, in that the reasons offered were false and the real reason for the action was discrimination. St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502, 515-17 (1993). At all times throughout this "burden-shifting" analysis, the Plaintiff bears the ultimate burden of proving discrimination. *See id.*

A plaintiff establishes a *prima facie* case of discrimination based on disparate treatment using indirect evidence, if he can establish: 1) he is a member of a protected class; 2) he is qualified to perform the job at issue; 3) he has suffered some adverse employment action; and 4) someone outside the protected class of which he is a member was treated differently[referred to as "comparators]. *See, e.g. McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802. There is no question Osahar is a member of a protected class and is qualified to perform his job. The Court will turn its analysis to the remaining two element of a prima facie case.

A. Adverse Employment Action

Title VII prohibits discrimination with respect to an employee's "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a), which is commonly referred to as an "adverse employment action" Merriweather v. Alabama Dept. Of Pub. Safety, 17 F. Supp. 2d 1260, 1274 (M.D. Ala. 1998). The Eleventh Circuit has held:

> [T]o prove adverse employment action in a case under Title VII's anti-discrimination clause, an employment action in a case under Title VII's anti-discrimination clause, an employee must show a serious and material change in the terms, conditions, or privileges of employment. Moreover, the employee's subjective view of the significance and adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances.

Davis v. Town of Lake Park, Florida, 245 F. 3d 1232, 1239, (11th Cir. 2001) (discussing in detail the element of a adverse employment action). Plaintiff's complaint alleges various adverse employment actions, none of which are adverse employment actions. Osahar claims he was "subjected to disparate treatment and a hostile work environment regarding job assignments, training, discipline, job responsibilities, counseling, [sic] pay, due to his race (African-American) and retaliation."

(Compl. ¶ 11). The Court will address Osahar's various alleged adverse employment actions, based on what the Court can ascertain from Osahar's extensive incoherent filings.

Osahar claims he should receive the "preferred assignments" (see, e.g., Comp. ¶ 10(I)). Osahar has not provided any evidence his seniority, job title, level, and benefits have been affected by his daily assignments. (Def.'s Stmt. ¶¶ 12,13,44,46,47). Osahar received a $500.00 special achievement award in 2001. Id. at ¶¶ 181,182. The parties agree Osahar was promoted several times, including to a Level 11 Electronic Technician in November of 2003.[13] (JPTS. ¶ V). The parties also agree that none of the Electronic Technicians are allowed to choose their daily work assignments. (JPTS ¶ VI). An Electronic Technician's wages, job title, seniority, or any other employment benefits are not affected by the daily assignments. (Def's Stmt ¶ 47). See Davis, 245 F.3d at 1242, n.4 (rejecting argument that a loss of prestige by itself is sufficient to state a claim; adding "discussing the job transfer at issue in that case, we stressed that "it is not enough that a transfer imposes some de minimis inconvenience or alteration of responsibilities.'" Citing Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1453 (11th Cir. 1998)).

Osahar's alleges someone altered a leave form as an adverse employment action. regarding the

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[13] The parties agreed Osahar was scheduled to be promoted in November 2003. (JPTS ¶ V(G)). There is no evidence before the Court that Osahar was not promoted in November 2003 as scheduled.

alleged incident, on October 14, 1995, Osahar left work sick (Def.'s Stmt. ¶ 55). The supervisor on duty completed a PS Form 3971 regarding Osahar's unscheduled sick leave. *Id.* Osahar claims the form was altered through the insertion of comments after Osahar signed it. Osahar's unscheduled sick leave request was subsequently approved and Plaintiff was paid. (Def.'s Stmt. ¶ 55). Osahar has not provided the Court with any evidence the alleged altered form somehow affected his employment.

Osahar further alleges his time card was missing from the time card rack. There is no evidence Plaintiff lost wages, was disciplined, or otherwise suffered any serious and material change to the terms and conditions of his employment.

Osahar's supervisor, Al Rosado, issued a Letter of Warning to Osahar for unsatisfactory attendance. (Def.'s Stmt. ¶ 81). Rosado issued the Letter of Warning as a means of correcting Osahar's attendance issues. *Id.* By July 1997, the Letter of Warning was removed from Osahar's records. *Id.* at ¶ 68. Osahar also complains about certain "discussions" or "threats of discipline." First, Al Rosado spoke with Osahar about his attendance problems. *Id.* at ¶ 49. The second discussion with Robert Cole was regarding Osahar and a co-worker, who each claimed the other person threw a piece of paper at him. *Id* at ¶¶ 188-90. Osahar has not provided any evidence that discussions or the Letter of Warning affect his seniority, benefits, wages, or job title. *Id.* at ¶¶ 49, 191.

The Davis Court was faced with a similarly-alleged adverse employment action as Osahar's allegations of the Letter of Warning and discussions. In Davis, the employee received a memorandum entitled "Failure to Follow Department Requirements (S.O.P.)," which detailed the employee's failure to follow certain procedures related to his work performance, including his failure to complete paperwork. Id. at 1235-36. After the employee filed a union grievance , the original memorandum was replaced with a "softer" memorandum. Id. The Court found that neither memorandum was an adverse employment action, since the employee did not suffer a reduction in salary, loss of benefits, denial of promotions, workplace reassignment, transfer, or change in permanent job title. *Id.* at 1236.

In the case at hand, Osahar's "Letter of Warning" and the discussions were warnings(as Osahar calls them "threats of discipline") and not in fact disciplinary action. Courts are "wisely reluctant to treat job performance memoranda as actionable under Title VII where they do not trigger any more tangible form of adverse action such as a loss in benefits, ineligibility for promotional opportunities, or more formal discipline." *Id.*
At 1241. That is exactly the case at hand. Osahar was warned about his absenteeism and tardiness. A warning could be used as a basis for later

discipline; however, such speculation is insufficient to show an adverse employment action, solely based upon the warning without more. In fact, that is precisely why employers use a progressive disciplinary system - - to give the employee a warning to correct improper behavior before imposing discipline, and if the employee does not repeat the improper behavior, the warning was thus effective, and discipline is rendered unnecessary. Therefore, this Court is unconvinced that Plaintiff has established the discussions and Letter of Warning were objectively a serious and material change to the terms of Osahar's employment.

Osahar complains about being declared absent without leave ("AWOL"). Supervisor Rosado placed Osahar on a leave-without-pay status ("LWOP") for May 10-11, 1996, claiming Plaintiff did not provide medical documentation that complied with USPS's requirements for an unscheduled sick leave. (Def.'s Stmt. ¶¶ 61-67). By July, the AWOL was rescinded, and the absence was converted to sick leave. Id. at ¶ 68. The AWOL/LWOP charged to Osahar for August 1996 was a clerical error, the error was corrected, and Osahar was paid. *Id.* at ¶¶ 92-101. With regard to the AWOL/LWOP, Osahar has not shown a change to the terms or conditions of his employment.

In January 1997, USPS denied Osahar's request for annual leave for January 23-29. Osahar's leave was approved for February 14, 1997 and the week

in August of 1997. (Def.'s Stmt. ¶ 111). Osahar has not shown how denial of leave for a particular time period affected Osahar's seniority, wages, job title, or benefits.

With regard to Osahar's claim he was called at home during an unscheduled sick leave and asked to bring in medical documentation, Osahar admits this did not result in a change to his hours, wages, benefits, seniority, or job duties. (Def.'s Stmt. ¶¶ 131, 138).

With regard to alleged lost training opportunities, Osahar claims he was not selected to attend a seminar in July 1997 on the Remote Bar Code System ("RBCS"). (Def.'s Stmt. ¶ 141). Osahar previously attended an RBCS training at the same location in June 1996. Id. at ¶ at 145. Osahar has provided no evidence that he either lost seniority or received a change in hours, benefits, wages, or job title as a result of not attending the RBCS training. Osahar alleges that on November 6, 1997, Bob Sharp stuffed a piece of paper in Osahar's shirt pocket. Osahar was not disciplined; he did not lose pay; he was neither demoted nor passed over for promotion. (Def's Stmt. ¶¶ 160-61). Sharp's alleged conduct, although possibly adverse, was not an *adverse employment action*, merely by virtue of the fact that the incident occurred at Osahar's place of employment.

Osahar also complains about the amount of his travel advance. Osahar alleges he received a smaller travel advance than a white co-worker,

Mike Denis, for a trip they took to Atlanta for training. Osahar was reimbursed for all of his requested travel expenses for the Atlanta trip. (Def.'s Stmt. ¶ 178). USPS claims it took into account the fact that Osahar had received a travel advance for a trip he took the week prior to the Atlanta training. There is simply no evidence Osahar suffered any serious and material change to the terms and conditions of his employment regarding the travel advance.

Osahar complains he was referred to the Employee Assistance Program ("EAP"), when Plaintiff and a white co-worker, Mike Denis, accused the other of throwing a piece of paper at the other. Such a referral is not considered discipline, is voluntary, and did not affect Osahar's job security or promotional opportunities. (Def.'s Stmt. ¶¶ 194-95). Osahar has offered no evidence that he suffered any serious and material change to the terms and conditions of his employment as a result of the EAP referral.

Osahar may not like the alleged actions, but his subjective view does not control. "Title VII simply does not extend to everything that makes an employee unhappy." Davis, 245 F.3d at 1242. None of the actions alleged change the terms, conditions, or privileges of Osahar's employment. In all, there is no evidence that Plaintiff suffered an adverse employment action and "even when considered collectively, [Plaintiff's allegations] do not rise to the required level of substantiality. No significant change in her employment status, such as hiring,

firing, failure to promote, reassignment with significantly different responsibilities, or any other significant change in benefits occurred." Isaac v. School Board of Miami-Dade County, 2002 WL 31086118, *9 (S.E. Fla. 2002) (Judge Jordan).

B. Comparators

Osahar also failed to carry his burden with regard to the fourth element of his prima facie case, which is the "similarly-situated employees" prong. To determine whether a person is a comparator, "it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." *Maniccia v. Brown*, 171 F.3d 1364,1368 (11th Cir. 1999). The plaintiff must show the comparator was treated more favorably by his employer than plaintiff. *Holifield v. Reno*, 115 F. 3d 1555, 1562 (11th Cir 1997) (as part of a "plaintiff's prima facie case, The plaintiff must show that his employer treated similarly situated outside his classification more favorably that [plaintiff]").

"To make a comparison of the plaintiff's treatment to that of non-minority employees, the plaintiff must show that he and the employees are similarly situated in all relevant aspects." Holifield, 115 F.3d at 1562 (emphasis added). "We require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employees" reasonable decisions and confusing apples with oranges." *Maniccia v. Brown*,171 F. 3d at 368.

Osahar's Response, Sur-Response, and own affidavit, with regard to the alleged comparators, are in violation of Fed. R.Civ.P. 56(e). Fed.R.Civ.P. 56(e) requires, in relevant part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify on the matters stated therein." Plaintiff has failed to show he has personal competence to testify to the issue of his alleged comparators. Osahar's Sur-Response provides citations only to his own affidavit in support of his allegations of similarly-situated individuals (see Sur-Resp.,passim). "To plaintiff's knowledge" is insufficient to establish competency (Sur-Resp. at 7). In short, Osahar has not adduced competent evidence that the named individuals are comparators. Osahar's conclusory allegations, which permeate his Response and Sur-Response, are insufficient to carry his burden.

C. Pretext

Assuming arguendo that Osahar had established a *prima facie* case of disparate treatment discrimination, Osahar failed to establish USPS's proffered reasons for its actions were pretextual. Under the McDonnell Douglas Burden-shifting framework, once a plaintiff has established a prima facie case of discrimination, the defendant must then adduce a legitimate, non-

discriminatory reason for the action. *See McDonnell Douglas* 411 U.S. 792. Here, USPS has proffered the various reasons, discussed above, which support to the alleged adverse employment actions (e.g., clerical error, prior training, attendance problems, failure to comply with policy). At this point, the burden shifts back to Osahar to show USPS's reasons are pretextual. Id. Plaintiff must show that both Defendant's articulated reasons are false and the real reason was discrimination. *See St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 248, 254 (1981). Further, at all times during the burden-shifting analysis, the plaintiff bears the ultimate burden of proving intentional discrimination. *Id.* Here, Osahar has offered no evidence of pretext and proffers only more conclusory allegations of discrimination, which are insufficient to carry his burden.

B. Retaliation

Plaintiff has likewise failed to prove a *prima facie* case for retaliation. In order to prove a prima facie case for retaliation, plaintiff must show: 1) he engaged in statutorily-protected activity; 2)he suffered an adverse employment activity; and 3) that there is a causal connection between the two. See, e.g., Brochu v. City of Riviera Beach, 304 F.3d 1144, 1155 (11th Cir.2002). There is no argument Plaintiff engaged in statutorily-protected activity;[14] however, Plaintiff has failed to show he suffered an

[14] The Court will assume Osahar has established a causal connection through temporal proximity.

adverse employment activity. As previously discussed, Osahar has not shown he suffered an adverse employment activity, nor has he proffered evidence of pretext.

C. Hostile Work Environment

Osahar's hostile work environment claim is premised on essentially the same facts as his claims for disparate treatment and retaliation. Plaintiff must establish: 1) he belongs to a protected group; 2) he has been subject to unwelcome harassment; 3) the harassment was based on a protected characteristic; 4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and 5) the employer is responsible for such environment under either a theory of vicarious or direct liability. *LeBlanc v. TJX Cos.*, 214 F. Supp. 2d 1319, 1331 (S.D. Fla. 2002). See also Pep Boys, 73 F. Supp. 2d at 1364; Johnston v. Henderson, 144 F. Supp. 2d 1341, 1360(S.D. Fla 2001). It is undisputed that Osahar is a member of a protected class and that the alleged harassment was unwelcome. Osahar's claim, however, fails to satisfy the remaining elements.

In making this determination, "[w]workplace conduct is not measured in isolation." *Clark County School Dist. v. Breeden*, 121 S. Ct. 1508, 1510 (2001); *Mendoza v. Borden, Inc.*, 195 F. 3d 1238, 1246 (11th Cir. 1999), cert. denied, 529 U.S. 1068

(2000). A court must look at all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," to determine whether, under the totality of the circumstances, the alleged harassing conduct altered the terms and conditions of plaintiff's employment. *Mendoza*, 195 F. 3d at 1246. As the Supreme Court has directed, "conduct must be extreme to amount to a change in the terms and conditions of employment." Faragher , 524 U.S. at 787 (emphasis added). "Isolated incidents of offensive acts, however, are not sufficient To establish a hostile work environment." Pep Boys, 73 F. Supp. 2d at 1365.

Beyond the facts alleged in Osahar's above-discussed discrimination and retaliation claims, Osahar also claims unidentified individuals put a broom, a recycling can, a mop, a vacuum cleaner, and garbage cans in front of his tool box, that a garbage can with the letters "EEO" was placed near a bathroom door, and "Omar eat shit" was written in graffiti in a bathroom. (Resp. at 21). Osahar provides the Court with no evidence that any of the incidents are based on race. If the "EEO" garbage-can incident occurred, and assuming it is relates to Osahar's EEO activity, Osahar has proffered no evidence that such incident occurred more than once to be anything more than an isolated incident.

Even assuming Osahar's allegations are true, giving every deference to Osahar, the non-moving party, for purposes of summary judgment, Osahar has neither alleged a sufficiently pervasive threatening environment such that it rises to the Court's standard, nor has he demonstrated the reasons for these incidents were motivated by his race or protected activity. *Hairston v. Gainesville Sun Publishing* Co. 9 F.3d 913,918 (11th Cir. 1993).

D. Material Fact in Dispute

Assuming again Osahar had established a *prima facie* case and pretext for his discrimination claims and hostile work environment claim, in order for a motion for summary judgment to fail, the plaintiff must show any issue of material fact is in dispute. Fed.R.Civ.P.56(c). Here, Osahar has failed to show there is a genuine issue of material fact. For Osahar's case to survive the motion, Osahar must show there is a genuine dispute regarding the elements of his discrimination, retaliation, or hostile work environment claims. Osahar's Response and Sur-Response contain a recitation of Osahar's conclusory allegations and legal conclusions ("The disparate treatment is clearly an adverse action under [Osahar's] retaliation and under [sic] disparate treatment claim[s]" [15](Resp. at 20); "As the Court can gleam, plaintiff was subjected to an on-going pattern of abuse which [sic] should shock the conscience of the

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[15] Osahar's legal conclusions often confuse the standard for his various claims.

Court, particularly when coupled with disparate treatment. The conduct was severe and pervasive and clearly rises to the level of a hostile work environment." (Resp. at 22)).

By its very terms, the summary judgment standard provides the mere existence of "some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there will be no genuine issue of material fact." Liberty Lobby, Inc., 477 U.S. at 247-48. Plaintiff's factual disputes that do not affect the essential elements of Plaintiff's claims (or otherwise stated, are not issues of material fact), do not defeat Defendant's Motion for Summary Judgment. In accordance with Fed.R.Civ.P. 56(c), there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law. For the reasons stated above, it is therefore:

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment (D.E. No. 29-1) is hereby GRANTED. Summary Final Judgment be and the same is hereby ENTERED in favor of the Defendant, John Potter, Postmaster General of the United States Agency and against Plaintiff, Omar R. Osahar. Plaintiff shall take nothing by this action and Defendant shall go hence without day. All pending motions are DENIED AS MOOT, and this case is CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 19 day of February, 2004.

/s/ JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 98-489-CIV-LENARD

OMAR OSAHAR,
Plaintiff,
vs.

MARVIN T. RUNYON, JR.,
Postmaster General of
The United States,

Defendant.
_____/

ORDER CONSOLIDATING CASES

THIS CAUSE came before the Court **SUA SPONTE** The Court having considered the Plaintiff's Amended Complaint filed March 9, 1998 in the above-captioned case, and otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED that this Case No. 98-489-CIV-LENARD shall be administratively closed. Case No. 97-753-CIV-LENARD is currently set for trial beginning the two-week period of June 15, 1998, with the pretrial conference to be held on May 26, 1998, with the pretrial conference to be held on May 26, 1998, It is further

ORDERED AND ADJUDGED that given that the Plaintiff has filed five (5) separate lawsuits during the past three (3) years, each alleging racial discrimination against the Defendant named above,

the Plaintiff is to refrain from filing any further such actions until the disposition of Case No. 95-753-CIV-LENARD or until the court provides him with leave to do so.

DONE AND ORDERED at Miami, Florida, this 27 day of March 1998.

/s/ JOAN A. LENARD
JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

cc: Omar Osahar, Pro Se
Vivian Rosado, Esq.

EXHIBIT A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 02-22227-CIV-MARTINEZ/KLEIN

OMAR R. OSAHAR,

Plaintiff,

Vs.

JOHN POTTER, Postmaster
General of The United States
Postal Service,

Defendant.
_____/

ORDER GRANTING CONTINUANCE OF TRIAL

THIS CAUSE came before the Court upon the Joint Motion for Continuance (D.E. No. 14-1), filed on **April 4, 2003**. It is hereby:

ORDERED AND ADJUDGED that

The Joint Motion for Continuance (D.E. No. 14-1) is hereby GRANTED. Calendar Call is RESCHEDULED for Thursday, October 2, 2003 at 1:30 p.m. Trail is RESCHEDULED for the two-week period beginning Monday, October 6, 2003. All pretrial deadlines SHALL BE RECALCULATED from the new trial deadline.

DONE AND ORDERED in Chambers at Miami, Florida, April 15, 2003.

/S/ JOSE E. MARTINEZ

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provide to:
Magistrate Judge Dube'
Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 02-22227-CIV-MARTINEZ/KLEIN

OMAR R. OSAHAR,

Plaintiff,

vs.

JOHN POTTER, Postmaster
General of The United States
Postal Service,

Defendant.
_____/

ORDER SETTING CIVIL JURY TRIAL DATE AND PRETRIAL SCHEDULE, REQUIRING MEDIATION AND REFERRING CERTAIN MOTIONS TO MAGISTRATE JUDGE

Trial is scheduled to commence during the two-week period commencing Monday, June 2, 2003 before the Honorable Jose E. Martinez, United States District Judge, 301 N. Miami Ave., Miami, Florida. Calendar will be held on Thursday, May 29, 2003 at 1:30 p.m. at the same location.

IT IS ORDERED AND ADJUDGED as follows:

1. No Pretrial Conference shall be held in this action, unless the parties so request or the Court determines, *sua sponte* that a pretrial conference is necessary. Should a pretrial conference be set, the compliance deadlines as set forth in the remainder of this Order shall remain unaltered.
2. Every motion filed in this case shall be accompanied by one proposed original order granting the motion. The order shall contain the up-to-date service list (names and addresses) of all attorneys in the case. In light of the court's "fax-back" program, additional copies of the proposed order and self-addressed stamped envelopes should not be provided.
3. Counsel must meet at least ONE MONTH prior to the beginning of the trial calendar to confer on the preparation of a pretrial stipulation. The original and one copy of a Joint Pretrial Stipulation must be filed on or before the date set forth below. The Stipulation shall conform to Local Rule 16.1(e) and include a joint, neutral summary of the claims and defenses in the case, not to exceed one short paragraph per litigant claim, to be read as an introduction for voir dire examination. The Court will not accept unilateral pretrial stipulations, and will strike sua sponte any such submissions. Should any of the parties fail to cooperate in the preparation of the joint pretrial stipulation, all other parties shall

file a certification with the Court stating the circumstances. Upon receipt of such certification, the Court shall issue an order requiring the non-cooperation party or parties to show cause why such party or parties (and their respective attorneys) have failed to comply with the Court's order.

4. Proposed jury instructions and verdict form must be submitted at least ONE WEEK prior to the beginning of the trial calendar. In preparing their requested jury instructions, the parties shall utilize as a guide the Pattern Jury Instructions for Civil Cases approved by the United States Eleventh Circuit, including the Directions to Counsel contained therein. The parties shall submit a SINGLE JOINT set of proposed jury instructions and verdict form, though the parties need not agree on the proposed language of each or any instruction or question on the verdict form. Where the parties do agree on a proposed instruction or question, that instruction or question shall be set forth in Times New Roman 14 point typeface. Instruction and questions proposed only by the plaintiff(s) to which the defendant(s) object shall be italicized. Instructions and questions proposed

Only the defendant(s) to which the plaintiff(s) objects shall be bold-faced. Each jury instruction shall be typed on a separate sheet and must be supported by citations of authority. Each disputed jury instruction shall also state the legal basis for the objection(s), also supported by citations of authority. A copy of the proposed jury instructions and verdict form shall be delivered to chambers at the time of filing, together with a computer disk compatible with Corel WordPerfect version 8.0. The computer disk shall contain two (2) saved versions of the proposed jury instructions; one version With citations of authority and objections, and one without. The Court expects that counsel will cooperate in good faith and, in most cases, should be able to agree on the general organization of the instructions and verdict form, standard instructions, and similar routine issues, thereby limiting the Court's consideration to *bona fide* substantive disputes relating to the instructions and verdict form. **Failure to cooperate in good faith and/or to submit proposed jury instructions as required by this order will result in appropriate sanctions being imposed upon the offending party, including dismissal of claims or striking of defenses.**

5. All exhibits must be pre-marked. The Plaintiff's exhibits shall be marked numerically. Defendant's exhibits shall be marked alphabetically. A typewritten exhibit list setting forth the number or letter, and description of each exhibit must

6. be submitted at the time of trial. The parties shall submit said exhibit list on Form AO 187, which is available from the Clerk's office.
7. A Motion for continuance shall not stay the requirement for the filing of a Pretrial Stipulation and, unless an emergency situation arises , a motion for continuance will not be considered unless it is filed at least twenty(20) days prior to the date on which the trial calendar is scheduled to commence. A continuance of the trial date will be granted only on a showing of compelling circumstances.

7. Non-compliance with any provision of this Order may subject the Offending party to sanctions, including dismissal of claims or striking of defenses. It is the duty of all counsel to enforce the timetable set forth herein in order to insure an expeditious resolution of this cause.

8. The following timetable shall govern the pretrial procedures in this case. This schedule shall not be modified absent compelling circumstances. **All motions for an enlargement of time for discovery and relating to dispositive motions must include a statement as to whether the requested extension will affect the trial date or any other deadline set forth in this timetable**.

Days Before Trial	
130 days	Joinder of Additional Parties and motions for class certification
120 days	Parties shall exchange expert witness summaries and reports As required by Local Rule 16.1.K.
110 days	Parties shall exchange written lists containing the names and Addresses of all witnesses intended to be called at trial and only those witnesses listed shall be permitted to testify.
100 days	Parties exchange rebuttal expert witness summaries and Reports as required by local Rule 16.1.K.
65 days	All discovery, including expert discovery, shall be completed.
55 days	All summary judgment and other dispositive motions must be Filed.
Note:	These provisions pertaining to expert witness do not apply to treating physicians, psychologists or other health providers.

65 days	All discovery, including expert discovery, shall be completed.
55 days	All summary judgment and other dispositive motions must be filed.
Note:	In the event that there are any unresolved discovery motion Pending fifteen days prior to this date, the moving party Immediately advise the Court of all such unresolved motions together with their status.
20 days	All Pretrial Motions and Memoranda of Law must be filed.
10 days	Joint Pretrial Stipulation must be filed.
7 days	Jury instructions must be filed.

9. In order to facilitate the accurate transcription of the trial proceeding, the parties shall provide to Larry Herr, the Court's Official Reporter, at 301 North Miami Avenue, 3rd Floor, Miami, Florida 33128 with a copy of a)the witness and exhibit list, b) a designation of unique proper nouns/names which may be used at trial, and c) a list of the names of all attorneys who will participate in the trial , to be received no later than three(3) days before calendar call.

10. If the case is settled, counsel are directed to inform the Court promptly at (305) 523 5590 and to submit a stipulation for dismissal signed by all parties together with an appropriate Order of Dismissal, pursuant to Fed. R. Civ. P. 41 (a)(1). Such stipulation an order must be filed within fifteen (15) days of notification of settlement to the Court. To be excused from calendar call, the required stipulation and order must be filed at least three(3) days before calendar call.
11. The parties may stipulate to extend the time to answer interrogatories, produce documents, and answer requests for admissions. The parties shall not file with the Court notices or motions memorializing any such stipulation unless the stipulation interferes with the time set for completing discovery, for hearing a motion, or for trial. Stipulations that would so interfere may be made only with the Court's approval. See Fed.R.Civ.P. 29.

12. At least 60 days prior to the calendar call the parties shall select a mediator certified under Local Rule 16.2.B, shall schedule a time, date, and place for mediation, and shall jointly file a proposed order scheduling mediation in the form specified by Local Rule 16.2.H. If the parties cannot agree on a mediator, they shall notify the clerk in writing as soon as possible and the Clerk shall designate a certified mediator on a blind rotation basis. Counsel for all parties shall familiarize themselves with and adhere to all provisions of Local Rule 16.2. The parties shall complete

Mediation at least 30 days prior to the calendar call. The parties shall notify the Court of the results of the mediation (settled, impasse or adjourned to continue discussions) within five (5) days of the conclusion of the mediation.

13. Pursuant to 28 U.S.C. § 636 and this District's magistrate Rules, all discovery motions and non-dispositive motions filed pursuant to Federal Rules of Civil Procedure 12,13 and 14 in this case are referred to Magistrate Judge Robert L. Dube'. It is the responsibility of the parties in this case to indicate the name of the Magistrate Judge on all motions and related papers referred by this order in the case number caption (CASE NO.: 02-22227-CIV-MARTINEZ/DUBE'), and to deliver a courtesy copy of all necessary materials filed after this date directly to the Magistrate's chambers.

DONE AND ORDERED in Chambers at Miami, Florida, December 12, 2002.

/s/ Jose Martinez

JOSE MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Dube'
Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 02-22227-CIV-MARTINEZ/KLEIN

OMAR R. OSAHAR,

Plaintiff,

vs.

JOHN POTTER, Postmaster
General of The United States
Postal Service,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S EMERGENCY MOTION TO STRIKE

THIS CAUSE came before the Court upon Defendant's Emergency Motion to Strike Portions of Plaintiff's Witness List and/or In the Alternative, To Limit the Witnesses to Those With knowledge of the Complaint's Allegations, filed on July 3, 2003. The Court has reviewed the motion and is duly advised. A review of the documentation provided with the motion, in particular, Plaintiff's

Preliminary Witness list, reveals Plaintiff did not make an effort to disclose the witnesses relevant to his case. It is therefore:

ORDERED AND ADJUDGED that Defendant's Motion to Strike Portions of Plaintiff's Witness List is hereby GRANTED. Plaintiff's Witness List is hereby **STRICKEN**, with the exception of Plaintiff, who shall remain as his own witness.

DONE AND ORDERED in Chambers at Miami, Florida, July 3, 2003.

/S/ JOSE E. MARTINEZ

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Dube'
Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 02-22227-CIV-MARTINEZ/DUBE

OMAR OSAHAR,

Plaintiff,

vs.

JOHN POTTER, POST MASTER GENERAL
Of the United States Postal
Service Agency.

Defendant.
_____/

99 Northeast 4th Street
Third Floor
Miami, Florida 33132

Monday, July 28, 2003

DEPOSITION OF

OMAR OSAHAR

Taken before Sonnia Martinez, Notary
Public for the state of Florida at Large

pursuant to Notice of Taking Deposition filed in the above cause.

CERTIFIED COPY

FERNANDEZ & ASSOCIATES COURT REPORTERS
444 Brickell Avenue, Suite 718, Miami, Florida 33131
DADE 305-374-8868 BROWARD 954-382-2101

INDEX

WITNESS	DIRECT
Omar Osahar	

EXHIBITS

No.1	Page 17	No. 2	Page 22
No. 3	Page 24	No. 4	Page 24
No. 5	Page 31	No. 6	Page 33
No. 7	Page 34	No. 8	Page 35
No. 9	Page 35	No. 10	Page 36
No. 11	Page 37	No. 12	Page 38
No. 13	Page 80	No. 14	Page 81
No. 15	Page 82	No. 16	Page 84
No. 17	Page 89	No. 18	Page 92
No. 19	Page 93	No. 20	Page 96

9	No. 21	Page 94	No. 22	Page 96
	No. 23	Page 99	No. 24	Page 101
10	No. 25	Page 104	No. 26	Page 108
	No. 31	Page 122	No. 32	Page 123
12	No. 33	Page 124	No. 34	Page 130
	No. 35	Page 131	No. 36	Page 136
13	No. 37	Page 141	No. 38	Page 144
	No. 39	Page 144	No. 40	Page 145
14	No. 41	Page 149	No. 42	Page 150
	No. 43	Page 153	No. 44	Page 156
15	No. 45	Page 159	No. 46	Page 164
	No. 47	Page 168	No. 48	Page 169
16	No. 49	Page 172	No. 50	Page 175
	No. 51	Page 176	No. 52	Page 180
17	No. 53	Page 181	No. 54	Page 182
	No. 55	Page 186	No. 56	Page 189
18	No. 57	Page 192	No. 58	Page 195
	No. 59	Page 207	No. 60	Page 208
19	No. 61	Page 210	No. 62	Page 211
	No. 63	Page 215	No. 64	Page 217
20	No. 65	Page 218	No. 66	Page 226
	No. 67	Page 228	No. 68	Page 232
21	No. 69	Page 239	No. 70	Page 247
	No. 71	Page 248	No. 72	Page 265
22	No. 73	Page 265	No. 74	Page 265
	No. 75	Page 275	No. 76	Page 278
23	No. 77	Page 281	No. 78	Page 283
	No. 79	Page 289	No. 80	Page 293
24	No. 81	Page 297		

444 Brickell Avenue, Suite 718, Miami, Florida 33131
DADE 305-374-8868 BROWARD 954-382-2101

And what does your son do, sir? Is is in high school?

A. He's home from college. He's at Tuskegee University so he's just in his summer break.

Q. Okay.

sir, did you have any military service?

A. No. I didn't.

Q. Okay.

Mr. Osahar, I just wanted to direct your attention to the boxes behind you. Those are the eight boxes that you delivered to my office on July 18th. I'm returning them to you.

A. All right.

Q. I just want to ask you a couple of questions with regard to those boxes. You produced those documents in response to Defendant's Request for production; is that's correct?

A. Yes, I did, that's correct.

Q. And if you want we'll have somebody help you take them back to your car after the deposition is over, okay?

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I think they take three months of that and that pushes my date back from June to March, you know?

Q. Okay. So you think you received some credit for the part-time work?

A. I Know it applies for retirement. It may be also affected by seniority, but I' m not too sure but I know it affects my retirement date because it wouldn't be June, it would be like in March.

Q. Okay. That's good to know. Thank you.

what is your current position with the Postal Service?

A. Electronic Technician, Level 10.

Q. Mr. Osahar, when did you become a Level 10 Electronic Technician?

A. Well, they just upgraded all the Level 9s, I don't know, maybe a year or so ago because of the contract. I was a Level 9 Electronic Technician and because Union contract we were upgraded to Level 10.

Q. Okay.

If I could ask you a couple of

25 questions about that. But before I go on,

1 Q. Mr. Osahar, just to clarify because I'm a little confused. There currently does
2 not exist a Level 12 at this moment in time?
4 A. Right.
5 So the highest level you can obtain
6 at this moment in time is Level 11?
7 A. That's correct.
8 Q. So what I understand you saying and
9 please, you know, correct me if I'm wrong, is
10 that in November, 2003, there's going to be
11 another position created that's a Level 12?
12 A. no, that's not correct.
13 Q. Okay.
14 A. What I'm saying is there's going to
15 be a Union contract collective bargaining
16 exchange, an agreement between the Post Office
17 and the Union –
18 Q. Uh-huh.

A. - -where all the Level 10s—
Q. Become 11s?
A. - - are going to be shifted. It's not, based on my understanding, going to be a new position created. The position is already there. Everybody is going to be moved up one level.

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DADE 305-374-8868 BROWARD 954-382-2101

A. I do.
Q. Are there any other benefits that you could think of that I missed that you receive?
A. How about benefits of seniority?
Q. Okay. Well, did your benefits of seniority, have they changed?
A. No, they stated the same.
Q. Okay. You haven't lost any seniority?
A. No, I haven't lost any seniority.
How about constitutional right?
Mr. Karlin: You've got to stay focused on the question.
THE WITNESS: Okay.
BY MS. LAGOA:

Q. We're talking about employee benefits under the different - -
A. Okay.
Q. All right.
(Exhibit No. 5 was marked for Identification.)
BY MS. LAGOA:
Q. Mr. Osahar, I'd like to show you what's been marked as Exhibit Number 5.

question. I was marked AWOL, I quess it's like not being paid for a day or so.
Q. But that's not being terminated.
A. That's not being terminated and you don't look at that as being suspended or being away from the Post Office.
Q. No. Termination is you've been fired.
A. Okay.
Q. And you've been brought back but – or you've been laid off.
A. Okay.
Q. And the answer to that is no, I assume, you have not been laid off?
A. Right.
Q. You have not been terminated
A. That's correct.

MS. LAGOA: Okay.
Mr. Osahar, also I just want to mention to you, this is not a , you know , a contest. If you need to go to the bathroom, if you need a break, you let us know and we'll take a break. The court reporter also will need a break at some point and Mr.

particular day. If I'm given that on my slip then normally I would go out and try to repair that particular problem. If I'm given the TACS assignment.
Q. Is there something called MODS that are scales that are part of TACS?
A. Well, it's not a par of TACS. The MODS scale is not a part of TACS, but it is in what is called the TACS ET room and normally you're given both assignments together on that sheet. When you're given TACS you're normally given the MODS scale.
At one particular point when it was called PSDS system the MODS scale was connected to the main computer for the PSDS system, so it

was like almost one unit. When you looked at the main computer you would see the system. sometime around the end of the PSDS period they separated the MODS scale from the PSDS.

Q. Okay.

A. And they – there was two separate units. Then they brought in the TACS system. TACS is a separate unit which doesn't work with

question.

BY MS. LAGOA:

Q. you may not need to because I may have the document for you, but if you feel that you want look at your file, you know, that's fine.

A. Okay, Okay.

(Exhibit No. 17 was marked for Identification.)

BY MS. LAGOA:

Q. I'm going to start with the EEO Complaint Number 1-H-331-0033-98. Mr. Osahar, I'd like to show you what's been marked as Exhibit 17, which is the precomplaint information that you provided which regards to 1-H-331-0033-98.

Mr. Osahar, can you look at page 3 of this precomplaint information and tell me if that's your signature.
A. That's my signature.
Q. And you dated this 12/12/97?
A. That's correct.
Q. Okay.
Mr. Osahar, on the first page of this information for precomplaint counseling

you indicate that on November 6, 1997 you were off the clock for lunch and on your way back from lunch you clocked back in and Mr. Bob Sharps stepped in front of you and stuffed a white label in your pocket for unknown reasons and said to give this to your boss.
A. Correct.
Q. That's the basis of this EEO complaint 1-H-331-0033-98; correct?
A. Right.
Q. Okay.
Mr. Osahar, can you tell me who Bob Sharps is?
A. Well, he was, I believe, a manager. I know he worked – he was a manager. I'm not

sure what his exact title is or was at that particular time.
Q. Is he still employed with the Postal Service?
A. I have no idea.
Q. Mr. Osahar, did you report the incident to anyone?
A. Yes, I did.
Q. Who did you report it to?
A. I know I reported it to -- to

A. Okay. I agree with you.
Q. Okay. Mr. Osahar, I'm moving to the next EEO complaint which is, that I'm going to address, which is 1-H-331 - -
A. Excuse me, can I -- can I go back to this question? I see the confusion here. Dealing with 1-H-331-0033-98, I think I was in court at the time of this -- of the 90 days and I was issued an order by – I was constantly adding and amending the first case and I was told by the judge at that particular time , I think Judge Joan A. Lenard, not to file anymore particular cases, which might have affected my

filing of 1-H-331-0033-98
Q. Mr. Osahar, did you file a lawsuit in August 2001 on 1-H-331-0033-98?
A. If I didn't it was because of an order by Judge Joan A. Lenard that was given to me at that particular time. I did inform my lawyer of the time limits, but if I didn't it was because of the court, federal court order. I was in circuit court at the time and other cases were being considered.
Q. Mr. Osahar, we're looked at the EEO manual booklet that you received from the

Phillip Demars.
A. That's correct.
Q. Okay.
Mr. Aquilino is a white electronic technician?
A. That's correct
Q. And Mr. Sosa is a white Hispanic technician?
A. That's correct.
Q. And Mr. Steve Copestick is a white electronic technician?
A. That's correct.
Q. And Mr. Villar is a white Hispanic technician?

A. That's correct.
Q. And what race is Phillip Demārs?
A He's white , not – there's a error there.
Q. He's not Hispanic. That's an error,
A. He's not Hispanic. That's an error, typographical error.
Q. Mr. Osahar, in July of ' 97 when you did your precomplaint on 1-H-3310120-97 was Mr. Demars an employee still at the Miami Postal facility?

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103

A. No, he wasn't
Q. Okay.
Do you know if Mr. Aquilino was selected to attend the seminar in July of 1997?
A. I don't believe he was.
Q. what about Mr. Copestick?
A. I don't believe he was.
Q. What about Oscar Sosa?
A. I don't believe he was.
Q. And Mr. Phillip Demars, was he selected?
A. Not for that particular seminar but he was selected for a seminar before. And once he was selected for a seminar before - - I was told that the reason he was selected, he was a

16 junior ET, is because he was on the level - - we
17 were Level 9s at that particular time. I was
18 told he was a Level 10 [16]so he was on the Level
19 10 register and that's the reason why he was
20 selected for the seminar ahead of me.
21 Q. Okay.
22 The seminar that agency complaint
23 1-H-331-0120-97 is talking about, though, is a
24 seminar in July of '97 that was remote bar
25 code sorter seminar to be held in Norman,

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107

1 A. No, I don't.
2 Q. Do you know how many trainings Steve
3 Copestick attended in 1997?
4 A. No , I don't.
5 Q. Do you know how many trainings Oscar
6 Sosa attended in 1997?
7 A. No, I don't.
8 Q. Do you know how many trainings Bob
9 Aquilino attended in 1997?
10 A. No, I don't.
11 Q. Okay.

---

[16] This is an error. It should state that I was told he was on the level 10 promotion register.

Did your job duties change as a result of you not being selected to attend the seminar in July of 1997 in Norman, Oklahoma?

A. it did affect - - yes , it did affect my job duty in the fact that it affects your assignment in the IPSS room. I believe it affected different modifications, future modifications and involvement in work since I didn't - - I believe - -

Q. This was a seminar on the remote bar code system training; correct/

A. Right.

Q. Okay.

A. It did affect my assignments.

Q. From Norman, Oklahoma for the IPSS/RBCS maintenance training; correct?

A. That's correct.

Q. Did you have a change in your seniority from not being selected to attend the July, 1997 seminar?

A. No

Q. Did you have a change in your wages? Did you get less money by not being selected to attend that seminar?

A. It might have affected overtime. I'm not sure, but I get the same wages.

Q. Okay.

A. It might have affected overtime.
Q. Okay.
Did you have a change in benefits from not being selected to attend the July 1997 seminar in Norman, Oklahoma?
A. No, not as far as – it affected what I consider future - - it affected my status for future opportunities which might affect future benefits as far as benefits as far as promotions.
Q. Well, you were promoted to a Level 10 so how did it affect your promotion?

A. it could affect my promotion to Level 11. It might affect –
Q. you're scheduled to be promoted on Level 11 in November of this year. Exactly how are you affected - -
A. We're talking about two different Level 11s. The Level 11 now is not the same level 11 that I get in November.
Q. Mr. Osahar, since July of 1997 you've been promoted ; correct, to a new level, Level 10?
A. Since when?
Q. July of 1997 - -
A. Right.
Q. – when you were a Level 9 you've

since been promoted to a Level 10 technician; correct?
A. Along with other Level 9s.
Q. I understand that, but you have been promoted; correct? That's a yes or no.
A. It a contract change. I'm not – it was a contract change.
Q. You were elevated to a Level 10; correct?
A. Right.

did talk to him around six something in the morning.
At that time our starting time was not 6:30, it was seven o' clock in the morning at that particular time.
Q. Okay.
So you recall calling in sick on August 9th?
A. Right.
Q. And you spoke to Mr. Rosado?
A. Right. I spoke with Mr. Rosado.
Q. Did he ask you at that time to bring in medical documentation to substantiate your absence?

A. I would have to - - I need to see my file and I got – this is the time that I got to refer back to more than this to see what happened.

Q. Let me ask you a question prior to that. You did have annual leave scheduled for August 10th to August 16th of that time frame; did you not?

A. Okay. That sounds like right. That helps out by you saying that.

Q. Let me show you the vacation

approval slip. Let me mark this as an exhibit.

(Exhibit No. 31 was mark for Identification.)

BY MS. LAGOA:

Q. Mr. Osahar, I'd like you to look at Exhibit 31, which is a form 3971, approving annual leave signed by Mr. Rosado on 6/11/96 approving leave for a week, 40 hours, from 8/10 to 8/16.

A. Right, ok . That's correct.

Q. So when you called in sick on August 9th you were scheduled to start annual leave, vacation for a week.

A. Right. That's correct.

Q. Do you recall then at – when you

called Mr. Rosado him asking you in that morning phone call to bring in documentation?

A. I would - - he might have, but I have to check my other records.

Q. Well, let me ask you another question. Do you know of any other employees in Tour II who called in sick before beginning annual leave?

A. I'm not sure. I don't know

everybody's record. I don't keep – I don't save that information. All employees don't check with me and tell me when they call in and when they have annual leave.

Q. When you returned from annual leave on, I assume , 8/17, did you bring in a medical note at that time?

A. I did. If he requested medical documentation I brought in medical documentation.

(Exhibit No. 32 was marked for Identification.)

THE WITNESS: Can I check my file on this particular case.

MR. KARLIN: She's going to give you the note.

BY MR. LAGOA:.

Q. Mr. Osahar, I'd like for you to look at Exhibit 32, which is the doctor's note that you presented to - - well, is this the doctor's note that you gave to Mr. Rosado?

A. It probably was, it was around 8/9/96, it must have been.

Q. So this is a note from a dentist - -

A. Right.

this grievance?

A. I believe I was.

Q. Were you also advised or represented by outside counsel with regard to the grievance?

A. Outside counsel?

Q. for example, someone like Mr. Karlin, did someone else represent you during the grievance process?

A. Not that – except for this particular case I filed an EEO and I filed a grievance. At a later stage I think Mr. Stewart Karlin got involved with it. Before he got involved I was representing myself in the EEO process.

Q. No, I'm talking about the grievance process.

A. Well, the grievance process was represented by the Union and the shop steward.

Q. Okay.
Do you know what the resolution of this grievance was?
A. I think eventually they - - I need to get a copy of - - I think - - you got a copy of it? I think they had to change that AWOL over

to sick leave. I'm not sure. I have to read the decision.
Q. So you were paid for the hours that were initially charged - -
A. I believe - - I believe I was, but there's one case that I was not paid for the hours and I want to make sure I get the particular day. One case - -
(Exhibit No. 34 was marked for Identification.)
BY MS. LAGOA:
Q. Okay. Mr. Osahar, I'd like to show you what's been marked as Exhibit 34 Do you recall seeing this , which is a resolution of the grievance involving the AWOL issue for the week of 8/10/96 through 8/16/96. It's a letter dated October 11, 1996. It indicates in the third paragraph: Based on consideration of these facts, the information contained in this grievance filed and the pertinent contract provisions involved

it is mutually agreed to resolve this grievance as follows: The records indicate that this situation was caused by a clerical error at the area data site and has been corrected and the

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refreshed your recollection, okay?
Mr. Osahar, on February 13, 1997 you called in sick before your tour of duty started; correct?

A. I need to see the 3971 on that.

Q. Okay. I have that.

Mr. Osahar, I'd like to show you what's been marked as Exhibit 38, PS Form 3971 for the date in question, 2/13/97.
I'd also want to show you what I'm going to mark as Exhibit 40.
(Exhibit No. 40 was marked for Identification.)
BY MS. LAGOA:

Q. Mr. Osahar, here is Exhibit 40 which on the top contains a PS Form 3971 for vacation that was approved for 2/14 on 2/6/97 and the bottom contains the same PS 3971 form that's Exhibit 38.

A. Okay. All right.

Q. When you called in on February 13th

to advise, I assume, a supervisor that you were going to be out, that you were sick, did you speak to Mr. Rosado or do you recall who you spoke to?

A. That's correct
Q. And Mr. George Zirini is a white technician?
A. I think he's whit Hispanic. I'm not sure, but I believe he's whit Hispanic.
Q. Okay.
Do you know if any of the white technicians have been asked to bring in medical documentation for sick leave?
A. I don't know. I might have overheard - - I'm not sure. I'm not sure. I don't know.
Q. Do you know if any of the Hispanic electronic technicians have been asked to bring in medical documentation to substantiate and illness or unscheduled sick leave?
A. I'm not sure.
Q. Do you know if any of the white technicians have been asked to bring in documentation and have failed to bring in the documentation?
A. No, I'm not.
Q. Do you know if any of the Hispanic

24 electronic technicians have been asked to bring
25 in medical documentation and have failed to

1 marked as Exhibit 48 to see if it refreshes
2 your recollection. It's a Form 1547 signed by
3 you on 1/16/97.
4 A. Okay.
5 Q. Where you requesting choice vacation
6 for 8/10/97 through 8/23/97?
7 A. Okay.
8 Q. And 1/23/97 to 1/29/97?
9 A. That's correct.
10 Q. Okay.
11 Was this - - Exhibit 48, is this your
12 choice vacation that you're requesting?
13 A. Yes, it was.
14 Q. And is it your understanding that
15 choice vacation is approved by seniority?
16 A. I believe so. By seniority and by
17 the local attendance or whatever, vacation
18 agreement by collective bargaining agreement.
19 Q. The Local Memorandum of
20 Understanding, is that what you're talking
21 about?
22 A. I think that's a part of it. I
23 think it starts off with the contract and i
24 think the contract might reference the Local

25 Memorandum.

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employees with the time he's supposed to, then that's going to control or affect his time that he gets all of them back in.

(Exhibit No. 49 was marked for Identification.)

BY MS. LAGOA:

Q. Okay.

Mr. Osahar, I'm going to show you Exhibit Number 49.

A. Do you have that in writing, when all of them should be submitted?

MR. KARLIN: There's no question.

THE WITNESS: Okay.

BY MS. LAGOA:

Q. Mr. Osahar, can you look at what has been marked as Exhibit 49.

A. Okay.

Q. It's a Form 3971, request for notification of absence. In it you are requesting annual leave for 1/23 to 1/29 and you're requesting this on 1/16/97 Is this the vacation leave that was disapproved that you're complaining about in 1-H-331-0040-97?

A. I believe it is.

treated differently than you. And you wrote: Electronic technicians on Tour II.

A. Right.

Q. Is it your understanding that all of the other electronic technicians on Tour II have never had their vacations disapproved?

A. No, no, that's not my understanding.

Q. Okay.

Mr. Osahar, when you gave the Form 3971 to Mr. Rosado, which is Exhibit 49, did you ask him to approve it then and there?

A. No, no, I didn't. I didn't no, no, no, I did not.

Q. Okay. All right. That is fine.

Mr. Osahar, did you have other vacation approved in 1997?

A. I might - - well –

Q. Well, we know you had February 14, 1997 approved.

A. Well, it was only one vacation form. You only get one per year.

Q. One choice vacation?

A. One form that you mentioned earlier, form so-and-so-17, it's only one form that you submit.

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A. I believe so. If my memory is correct I believe it's dealing with vacation - - I got to check my records. I think if this is what I think it is, this was disapproved at one time. It wa - - I had to call the shop steward and once I called the shop steward it was approved for one day, but I also talked to labor relations and was told I had to take - - the rule was you had to take five days off or 40 hours for vacation leave, which was what I ultimately did. So I don't think I took one day off even though - -

Q. So the short answer to my question is, you then had five days of vacation given to you in August, 1997 - -

A. Okay.

Q. - - approved; correct? You took five days off in August of 1997?

A. Okay.

Q. Yes?

A. I believe so.

Q. Thank you.

That's yours, Mr. Osahar.

A. I know, I'm just hold this up. I'm not giving this to you.

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Mr. Osahar, can you look at Page 3 of Exhibit 53.

A. Page 3 ?

Q. Yes, Item 4.

A. Okay. All right.

Q. First sentence which says: Annual Leave shall be granted to employees according to their city-wide seniority, by craft, within the sections to which they are assigned.

A. Correct.

Q. That's your understanding of how annual leave is given out?

A. Correct.

Q. And your craft is the maintenance craft?

A. That's correct.

Q. And your section is what, Electronic Technician Level - -

A. I believe it is. I believe - - well, that section might be electronic technicians. I don't know what Tour II is.

Q. Okay.

When it says city-wide seniority, does that imply all the electronic technicians in Miami or does it just mean the electronic

technicians?
A. I believe so.
Q. And Hispanic electronic technician?
A. Right.
Q. Okay.
Do you know if other employees in Tour II have left work after receiving an assignment and indicated that they were sick?
A. There might have been.
Q. Who?
A. As far as I can remember - - well, Tom Gaunt was one. I think Rafael Vasquez I think is another.
Q. Rafael Vasquez is African American; correct, or he's black Hispanic.
A. Maybe black Hispanic.
Q. Rafael Vasquez is black Hispanic?
A. Maybe so. I believe you're right. He speaks Spanish and is dark skinned. I think he's from - - he might be - - I believe he's from -- I'm not sure, Honduras or something. You're got to ask him what he considers himself.
Q. Okay.
Mr. Osahar, did you lose any

A. No, I'm not the most senior man.
Q. Okay, Well, you said you were the more the senior man.
A. Well, what I meant was more senior than a lot of other ETs there. I'm number four on the seniority list. When I said the senior man I mean based on the seniority list I'm given a certain number and based on that number it's seniority number four out of 40 or 50 people, that's what I mean.
Q. You didn't lose your level of seniority; correct?
A. What I said was I lost benefits of seniority. And the benefit of seniority is the fact that a senior person more senior than Oscar Sosa, more senior than Max Steinberg, more senior than Steve Copestick, more senior than Jorge Villar, more senior than a lot of other people - -
Q. What benefits did you lose?
A. The fact that the junior people should be given the less desirable assignments.
Q. Okay. Mr. Osahar, let me stop you first.
Is it your contention that the

electronic technicians on Tour II are allowed to select their assignments?
A. No.
Q. Okay.
Is it your contention that if you receive a particular assignment you will get more or less money on Tour II? You would have gotten the same money for doing the assignment that day than you would have if you had received another assignment; correct?
A. Well, no, sometimes you're given more money depending on the assignment. Sometimes - -
Q. You're talking about overtime, though; aren't you?
A. I'm talking not only overtime sometimes they pay you a higher level for a particular assignment that you're given. For example Oscar Sosa was given a particular assignment and they paid him Level 10 - -
Q. We're not there yet. That's another EEO complaint, okay.
A. Again, I'm answering your question. Based on the assignment that you're given you

question.

MS. LAGOA: Can you read back the question.
(Thereupon, the last question was read by the reporter as stated.)
THE WITNESS: Yes , that's also correct. I think it might have been the time when I was trying to call my family and tell them about some bad water situation thing, I think, that also happened on this particular day.
BY MS. LAGOA:
Q. Okay. But that's not referenced in your - -
A. Okay. Yeah, the main issues are - -
MR. KARLIN: Just answer the question. After an hour you felt sick and you went home.
THE WITNESS: Yes, that's correct.
BY MS. LAGOA:
Q. Okay.
Isn't it true, Mr. Osahar, that you did receive EZR training at some point in time?
A. I received EZR training, EZR I

trained, that's correct.
Q. That is correct; correct?

A. EZR I.
(Exhibit No. 59 was marked for Identification.)
BY MS. LAGOA:
Q. I'd like to show you what's been marked Exhibit 59. This a record of training that shows that you did receive training on the Expanded ZIP Retrofit on June 20, 1986; correct?
A. Right, this is EZR I, not EZR II.
Q. I understand. I understand.
A. Okay.
Q. But is it your understanding that the EZR II is an updated version of the EZR I?
A. It's a whole completely different system, computer-wise and everything.
Q. Is it a different system or it has different menu?
A. It's a different system.
Q. Okay. Is it not something that you could be trained on, on-the-job training?
A. It's something I can't be trained on.

A. That's correct.
Q. All right.

Did you have any outside counsel that assisted you with that grievance?

A. Just myself, the union and - - and later I gave it to my attorney.

Q. You later gave it to your attorney, Mr. Karlin, is that who you're pointing at?

A. Well, yeah, he's handling the case now once I reached the stage where it started going toward federal court. At the time I filed the grievances it was only myself and the Union.

Q. Okay. Mr. Osahar, what was the resolution of that grievance? Did you not have the AWOL charge removed from your file?

A. Okay. All right. That sounds like - -

(Exhibit No. 63 was marked for Identification.)

BY MS. LAGOA:

Q. Let me show up what's been marked as Exhibit 63. Mr. Osahar, I'd like you to look at

what has been marked as Exhibit 63.

A. Okay. Correct.
Q. Can you look at the second page?
A. Right.
Q. Dated 7/25/97.
A. Okay.
Q. Correct?
A. Correct.
Q. All right.
And it's signed by a Postal Service representative and it's signed by a Union representative; correct?
A. That's correct.
Q. All right.
And in it it says that it is agreed that the AWOL charge to the grievant, which is you, Mr. Osahar, for his absence on May 10, 1996 will be converted to sick leave and the grievant will be made whole. It is further agreed the LOW, which stand for letter of warning, dated June 11, 1996 will be removed from the records and files effective with the signing of this settlement; correct?
A. That's correct.
Q. And does it not further say: The

Union and the employee agrees to withdraw all pending appeals, complaints, grievances,

etcetera, in all forums including but not limited to Grievance-Arbitration procedures, EEOC, MSPB, etcetera, for any purposes whatsoever relative to this matter?

A. That's correct, it says that.

(Exhibit No. 64 was marked for Identification.)

BY MS. LAGOA:

Q. Okay.

Mr. Osahar, I'd like to move on to Agency Case Number 1-H-331-0089-01.

A. Okay.

Q. Mr. Osahar, I'd like to show you what's been marked Exhibit 64.

A. Okay.

Q. This is a precomplaint counseling information for agency case number 1-H-331-0089-01

Can you turn to Page 3. Is that your signature?

A. Page 3?

Q. Yes, Sir.

A. Yeah, that's my signature.

differently than you with regards to agent case number 1-H-331-0089-01.

With regards to the TACS conversion did Steve Copestick work on that project?

A. I don't believe he did. I'm not sure.
Q. Okay. Did Bob Aquilino work on that project?
A. I don't believe he did.
Q. Wasn't Bob Aquilino retired by the time the TACS conversion occurred?
A. Probably was.
Q. Was Steve Folandi at the facility at that moment in time?
A. No.
Q. So why did you include those individuals in this?
A. Well, because of the treatment that they - - Bob Aquilino, Steve Folandi worked PSDS and the way I was treated as far as being taken off the different projects from my assigned project and not just using the WDTs.
Q. But these individuals were no longer at the facility when you did this.
A. They didn't treat them that way when

UNITED STATES POST OFFICE
South Florida District

Date: 7/25/97
REF: SND09:SHMurray:ac:memo
SUBJ: Pre-Arbitration Settlement

TO: Donna Rivera-Harris, General President
American Postal Workers Union
Miami Area Local
7910 NW 25 Street, Suite 200
Miami Fl 331222-1602

Appeal No: U96-0360DT
Grievant: O. OSAHAR
City: Miami
Local:
Date of Letter of Appeal to Arbitration: 7/24/96

As a result of pre-arbitration discussions, it is mutually agreed to settle the above Referenced case as follow:

It is Agreed that the AWOL charged to The Grievant for his absence on May 10, 1996 will be converted to sick leave and the Grievant will be made whole. It is Further agreed that the L.V.W dated June 11,1996 will be removed from All Records and files effective with the Signing of this settlement.

The Union and the employee agrees to withdraw All pending appeals, complaints Grievance, etc. in all forums, including but not limited to, Grievance-Arbitration Procedures, EEOC, MSPB, etc., for any purposes whatsoever relative to this matter It is further agreed that the above settlement is reached on a non-precedent basis, Does not constitute a waiver of Management's position on similar cases, and is not to Be cited or referenced by the Union in future cases which may arise.

_____/s/_____
Postal Service Representative

_____/s/_____
Union Representative

Exhibit 221

EXHIBIT 222
UNITED STATES POST OFFICE
South Florida District

Date: 8/7/98
REF: SND09:SMurray:cnb:memo
SUBJ: Pre-Arbitration Settlement

TO: William Sullivan, President
American Postal Worker' Union
Fort Lauderdale Local
P.O. Box 8307

APPEAL #: U96-0485
GRIEVANT:OSAHAR
CITY : MIAMI
DATE OF LETTER OF APPEAL

A result of pre-arbitration discussions, it is mutually agreed to Title the above referenced case as follows:

(8/9/96)
THE AWOL CITED IN THE ABOVE – CITED GRIEVANCE IS HEREBY CONVERTED TO LWOP LAND WILL NOT BE CITGED IN ANY SOBSEQUENT ACTION.

The Union and the employee agrees to withdraw All pending appeals, complaints Grievance, etc. in all forums, including but not limited to, Grievance-Arbitration Procedures, EEOC, MSPB, etc., for any purposes whatsoever relative to this matter.

It is further agreed that the above settlement is reached on a non-precedent basis, does not constitute a waiver of Management's position on similar cases, and is not to Be cited or referenced by the Union in future cases which may arise.

_____/s/_____
Postal Service Representative

_____/s/_____
Union Representative

_____
Grievant

National Arbitration Panel

In the Matter of Arbitration	)	
	)	
Between	)	
	)	
United States Postal Service	)	
	)	
and	)	
	)	Case No.
American Postal Workers Union	)	
	)	Q00C-4Q-C 03126482
And	)	
National Association of Letter Carriers - Intervenor	)	
	)	
And	)	
	)	
National Postal Mail Handlers Union-Intervenor	)	

Before: Shyam Das

Appearances:

For the Postal Service: Larissa O. Taran, Esquire
For the APWU: Melinda K. Holmes, Esquire
For the NALC: Keith E. Secular, Esquire
For the NPMHU: Kathleen M. Keller, Esquire

Q00C-4Q-C 03126482

Place of Hearing:	Washington, D.C.
Dates of Hearing:	October 16, 2003 May 19, 2004
Date of Award:	January 28, 2005
Relevant Contract Provisions:	Article 10: ELM Subchapter 510
Contract Year:	2000-2003
Type of Grievance:	Contract Interpretation

Award Summary

The three issues raised in this case are Resolved as follows:

Nature of Illness

In applying ELM 513.332 in the context of The RMD process, ACS's may ask questions necessary to make FMLA determinations and to determine whether the absence is due to an on-the-job injury or for a condition which requires ELM 865 return-to-work procedures, in a manner consistent with the Findings in this decision, but may not otherwise require employees to describe the nature of their illness/injury.

FMLA Second and Third Opinion Process

The Postal Service 's current process for Initiating FMLA review by a third health Care provider, at issue in this case, is not Consistent with the FMLA or with ELM 515.1

and 515.54, and implementation of that Process violates Articles 5 and 10.2.A of The National Agreement. The Postal Service is directed to rescind that process.

FMLA Paid Leave Documentation

The Unions' contention that the protested Postal Service paid leave documentation Policy is improper and impermissible under the National Agreement is rejected.

/s/

Shyam Das, Arbitrator

change existing rules, regulations, the National Agreement, law, local Memorandums or understanding and Agreements, or grievance-arbitration Settlements and awards.

* * *

Pursuant to part 513.332 of the ELM, employees must notify appropriate injury and expected duration of absence As soon as possible....

Pursuant to part 513.361 of the ELM, When an employee requests sick leave For absences of 3 days or less, "medical documentation or other Acceptable evidence of incapacity for Work or need to care for a family Member is only required when an Employee is on restricted sick leave (see 513.39) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service." A supervisor's determination that medical documentation or other acceptable evidence of incapacitation is desirable for the protection of the interest of the Postal Service must be made on a case by case basis and may not be arbitrary, capricious, or unreasonable.

Pursuant to part 513.362 of the ELM, When and employee requests sick leave

Q00C-4Q-C 03126482

for absences in excess of 3 days
(scheduled work days), employees are
Required to submit medical
Documentation or other acceptable
Evidence of incapacity for work for
Family member, and if requested,
Substantiation of the family
relationship. Medical documentation
or other attending practitioner should
provide and explanation of the nature of
the employee's illness or injury
sufficient to indicate to management
that the employee was (or will be)
unable to perform his or her normal
duties for the period of absence.
Supervisors may accept substantiation
Other than medical documentation it
They believe it supports approval of
The sick leave request.

* * *

The parties agreed to continue discussions
Related to management requesting the nature
of the illness when an employee calls in;
FMLA second/third opinion procedures;
Medical documentation requirements to
Substitute paid leave for unpaid
Intermittent FMLA leave. In the event no
Agreement is reached within fifteen (15)
Days from the date of this settlement, the
Union may initiate a dispute at the national
Level ....

By letter dated April 23, 2003, the APWU initiated the Present national level dispute over the three remaining issues. This dispute subsequently was appealed to arbitration, where the NALC and the NPMHU intervened in support of the APWU'S position on the three issues.

100a

(See Exhibit V from D.E. No 50)

U.S. Postal Service
Pay, Leave, or Other Hours Adjustment Request/Record

Name..... / SSN ..... / D/A /week 2.... / PP-YR
OSAHAR, O...../ 265-76-2276..../168.../.... / 1996

Change LWOP to AL /s/ .....

WK 2	AL	LWOP
01/....Sat	+8	-8
02/....Sun		
03/....Mon		
04/.... Tue	+8	-8
05/....Wed	+8	-8
06/.... Thu	+8	-8
07/....Fri	+8	-8
Week Total	40	0

Change 40 HRL LWOP to 40 HRS AL WK2 /s/
Albeo Rosado /s/ 8/21/96

.....
.
.
.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 02-22227-CIV-MARTINEZ/KLEIN

OMAR R. OSAHAR,

Plaintiff,

Vs.

JOHN POTTER, Postmaster
General of The United States
Postal Service,

Defendant.
_____/

FINAL JUDGMENT

Pursuant to Fed R. Civ. P. 56 and 58, and in accordance with the reasons stated in the Court's Order Granting Summary Judgment on February 19, 2004 is entered in favor of the Defendant, John Potter, Postmaster General of the United States Postal Agency, and against Plaintiff, Omar R. Osahar.

DONE AND ORDERED in Chambers at Miami, Florida, this 5 day of March, 2004.

/S/

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE